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III

REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

THOMAS SERGEANT & WM. RAWLE, JUN.

VOL. VII.

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Eastern District of Pennsylvania, to wit:

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D. CALDWELL,
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JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA.

WILLIAM TILGHMAN, Esq. Chief Justice.

JOHN B. GIBSON, Esq.
THOMAS DUNCAN, Esq. } Justices.

ATTORNEY GENERAL.

THOMAS ELDER, Esq.

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TABLE OF THE CASES.

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CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA

LANCASTER DISTRICT, MAY TERM, 1821.—CONTINUED.

KEAN administrator of KEAN *against* ELLMAKER.

1821.
Lancaster

IN ERROR.

Wednesday, May, 28.

ERROR to the Court of Common Pleas of *Dauphin* county.

In a scire facias against a recognisor and terre tenant, on a recognisance in the Orphans' Court for land taken at an appraisement, the plaintiff must first recover judgment against the recognisor, and then proceed to separate judgment against the terre tenant, to have execution of the lands.

It is error, if after judgment by default against the recognisor, the jury is sworn as to the recognisor and terre tenant.

The declarations of the recognisor, after he has conveyed the land to a third person, are not evidence in the proceeding against such third person as terre tenant, to shew that the recognisor was or was not indebted.

This was a *scire facias*, on a recognisance in the Orphans' Court, to recover the value of a share of an intestate's real estate taken at the appraisement, brought in the name of *Amos Ellmaker*, Esquire, President of the Orphans' Court of *Dauphin* county, successor to *Walter Franklin*, Esquire, who was successor to *John Joseph Henry*, Esquire, for the use of *James Alricks*, against *John Kean*, Esquire, with notice to *Daniel Reigart* and *Nicholas Swoyer*, terre tenants in possession of a house in *Harrisburg*. After the bringing of the writ, *Kean* died, and *Jane Kean*, administratrix, with the will annexed, was substituted. A verdict and judgment had been given in this cause, in the year 1819, which judgment was reversed in *May*, 1820, on writ of error to this

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Court. (6 *Serg. & Rawle*, 44.) Afterwards a judgment *de bonis* was entered against *Jane Kean* by default. The cause then went to trial on the plea of payment: the jury were sworn as respected both the defendants, *Jane Kean* and *Nicholas Swoyer*, the writ not having been served on *Reigart*. It was admitted, that *James Alricks*, married one of the daughters of the intestate, *John Hamilton*, deceased, and that she was entitled to a share of the property, for the payment of the value of which, the recognisance was given by *Kean*, on which this suit was brought; and that the house occupied by the defendant, *Swoyer*, was part of the property taken by *Kean* at the appraisement. One question on the trial was, whether any thing remained due to *Alricks*. The plaintiff offered evidence to prove, that in the year, 1809, *John Kean* undertook to pay some of the heirs of *John Hamilton*, deceased, for *James Alricks*, and admitted he was then largely indebted to *James Alricks* for his wife's share in *John Hamilton's* real estate. To this evidence the defendant objected, but the Court admitted it, and the defendant excepted.

The defendant then offered evidence to shew, that *John Kean*, since 1809, had repeatedly said, that he had paid *James Alricks* in full for his share in the estate of *John Hamilton*, and that he stated the same thing in the fall of 1816, when examined as a witness before arbitrators. To this evidence the plaintiff objected, and it was overruled by the Court, who sealed another bill of exceptions.

A. Hopkins, for the plaintiff in error.

The declarations of *John Kean*, after he had conveyed to *Reigart* and *Swoyer*, were not evidence to affect either of them. The declarations of a grantor after his conveyance, are not evidence against the grantee. *Packer* v. *Gonzalus*, 1 *Serg. & Rawle*, 536. 539. *Phœnix* v. *Assignees of Ingraham*, 5 *Johns.* 412. 2 *Serg. & Rawle*, 354. At any rate, if the declarations of *Kean* are admitted to charge the terre tenant, his subsequent declarations on the same subject ought to be admitted to rebut them.

Elder, contra.

Reigart and *Swoyer* purchased, with notice of the recog-

nisance entered into by *John Kean*. The administratrix of *Kean*, was one of the defendants, and against her the declarations of her intestate were evidence. On the issue of payment, his confessions were good evidence. The case is not like that of one who conveys land, and afterwards makes declarations adverse to the title. Here the declarations are respecting a debt due from the grantor, which is collateral to the title. The case resembles that of joint tresspassers, where, after judgment by default against one, the jury are to assess the damages as to all. The judgment by default against the administratrix, is for the penalty of the recognisance: the amount to be paid by the condition is an indefinite sum, and must be fixed by the jury. The sum fixed by the jury, would conclude the administratrix, as well as the terre tenant. As to the second bill of exceptions, though the declarations of a party are evidence against him, yet his declarations made at a different time, are not, therefore, evidence for him.

Ellmaker, in reply.

The terre tenant was the only real defendant. The judgment which had been taken against the administratrix was for a sum certain, because the records of the Orphans' Court specified the sum payable to each child: there was, therefore, no necessity to make her a party to the issue tried. The declarations of *Kean* were not evidence against the terre tenant at all: but at all events, not those which he made subsequently to his conveyance to the terre tenants.

The opinion of the Court was delivered by

GIBSON J.—At the last *May* Term, when this cause was before us on another point, we described the course of the proceedings between a recognisee and terre tenants defending their separate interests on a *scire facias*. The recognisor and the land are both debtor: the first directly and personally, in consequence of the contract to pay: the second, as a fund in the hands of whomsoever it may be; but the recognisor is the person against whom the suit is to be brought, and until he is in Court, the cause cannot proceed for want of parties. Hence, if he does not appear, the plaintiff must do every thing he can to bring him in, or, in case of his death, his personal representative; and must, in either case, proceed

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for want of appearance, to judgment by default; and having thus disposed of the legal party, he may pursue against the land. The terre tenant, who has come in upon notice, then makes defence, which, it is obvious, may be different from, and therefore is always necessarily unconnected with, the defence of the recognisor:—as for instance he may plead a release of the particular land from the lien of the proceedings in the Orphans' Court. Each defends separately, and as the issue between the plaintiff and the terre tenants is collateral to the proceedings against the recognisor, who is the defendant on record, so must the judgment be, which is, that the plaintiff have execution of the lands in the hands of the terre tenant for as much as has been found against him. Here then the commencement of the error was, in swearing the jury as if the administratrix of the recognisor were a party to the issue, and jointly concerned in the defence set up by the terre tenants, when she had, in fact, been defaulted, her responsibility in respect of the assets fixed, and when she was to be considered a party for no other purpose than to enable the plaintiff to proceed against the land. As she represented only the interests of the recognisor and was no party to the issue, it is plain, that his admissions could not affect those who were *bona fide* purchasers from him before those admissions were made, and who therefore were neither parties nor privies. This is the principle so familiar in questions respecting the effect of recitals in deeds. But it is said, that as the judgment against the administratrix is for the penalty of the recognisance, the condition of which is the payment of an indefinite sum, it is necessary that a jury or inquest should assess the sum due; and that the verdict against the terre tenants would necessarily conclude the administratrix as a party to it, on the same ground that a jury, assessing damages against a joint trespasser, are also to assess the damages against those who have suffered judgment to go by default; and that, in that view, the declarations of the recognisor were evidence against his own estate, as far as it was involved. There is not, however, the most remote resemblance between the case of joint trespassers, when the judgment is the same against all, and when the jury who try the issue as to those who appear, also assess the damages against those who have suffered judgment to go by default,

and the case of a recognisor and terre tenant who represent distinct interests in different rights, and against whom there are separate judgments which differ in their nature and frequently in their amount. We are therefore of opinion, the issue was exclusively between the plaintiffs and the terre tenants, and that swearing the jury, as if the administratrix were a party, was error, and did not render her legitimately such; and that as the estate of *Kean* the recognisor, was not involved in the question, his declarations or admissions subsequent to the time when he parted with the land, were not evidence to affect it in the hands of the terre tenants.

On the other hand, it is urged that as the declarations of *Kean* were actually admitted to charge him, his subsequent declarations, that he had since paid the debt, ought also to have been admitted as rebutting evidence. The rule is that a particular part of a confession shall not be selected, but the party is entitled to all he said *at the time*, as explanatory of the expressions adduced; but it goes no further; for an admission would be of little value, if it might, when found to have been indiscreetly made, be afterwards qualified, or avoided altogether, by counter declarations. These fall within the rule, that a party shall not make evidence for himself, and it is therefore too clear for argument, that they were properly rejected.

Judgment reversed, and a *venire facias de novo* awarded.

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Commonwealth *ex relatione* DUFFY *v.* The President, Managers and Company of the Anderson's Ferry, Waterford, and New Haven Turnpike Road.

Friday, June 1.

MANDAMUS.

Under the 45th Sec. of the act of March 26, 1821, the Court will not grant a mandamus to a turnpike company to grant a certificate to a person claiming on a judgment against them, if they return that such judgment was not obtained for work, labour or service performed within the intent of the said Act.

It is not however a sufficient return that a judgment obtained against them is appealed from: such case is provided for by the act, and a mandamus will lie to compel them to grant a certificate.

RULE to shew cause why a *mandamus* should not issue commanding the defendants to grant to the relator, *Duffy*, a certificate issued by the president, attested by the treasurer, and sealed with the seal of the said company, and transmit a duplicate of the same to the State Treasurer, for a judgment obtained by the said *Duffy* against the same company, in the Court of Common Pleas of *Lancaster* county, amounting to 1899 dollars and 20 cents, with interest from the 22d *March*, 1819: also a certificate to the State Treasurer for 4989 dollars 20 cents, reported in favour of the said *Duffy*, on the 25th *January*, 1817, against the said company, from which the company had appealed and the appeal was depending in the Court of Common Pleas of *Lancaster* county.

The defendants returned for cause, that the judgment for 1899 dollars 20 cents, was not obtained for work, labour or service performed by *James Duffy* and *John Pedan*, for the said company, within the true intent and meaning of the Act of Assembly, passed the 26th day of *March*, 1821; nor was it obtained for work done on contract, on any part of the said turnpike road, and that the said judgment of 4989 dollars 20 cents, having been appealed from, remained undetermined in the Court of Common Pleas of *Lancaster* county; and they verily believe, that on the trial of the said suit, there will be found nothing due or owing to the said *Duffy* and *Pedan* by the said company.

They further returned, that they have not drawn any warrant on the State Treasurer for the sum authorised to be subscribed by the Governor, on behalf of the Commonwealth, nor are they ready or willing at this time, to draw out of the State Treasury any part of the amount of the States subscription, because they say, they are desirous of making a *final*

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settlement of the accounts of all persons, who may have performed work, or service, or to whom they are indebted for work done on contract, on the said turnpike road, previous to drawing their warrant on the State Treasurer. And they humbly submit to the honourable Court, that under the Act of Assembly, they are vested with a discretion, as to the time, when, they shall draw their warrant on the State Treasurer; nor are they bound to give any certificate until they are ready, and desirous of drawing out of the State Treasury the amount of the State's subscription, nor until the accounts have been settled by them.*

Hopkins for the relator, contended, that for the payment of 1899 dollars 20 cents, he was entitled to a certificate on which immediate payment would be received from the State Treasury. For the 4989 dollars 20 cents, for which a suit was

* Act of March 26th, 1821, Sec. 45.—"And be it further enacted that the Governor be, and he is hereby authorised and required, to subscribe on behalf of this Commonwealth, for one hundred shares, at one hundred dollars per share, of the Anderson's Ferry, Waterford, and Newhaven Turnpike Road Company, to be drawn by warrants in the usual manner on the treasurer, and to be paid to the president and managers of the said company.

Sec. 77.—And be it further enacted, &c. That it shall be the duty of the president and managers of the several turnpike road and bridge companies, to which roads or bridges, the Governor is, by this Act, authorised to subscribe for stock, before they or any of them shall draw out of the State Treasury any part of the amount of the State's subscription, in this Act authorised to be subscribed, to settle the accounts of all such persons who may have heretofore performed work, labour, or service, and to whom they are indebted for work done on contracts on any part of the said turnpike roads or bridges, and who hold the accounts in their own right, without having heretofore made a transfer thereof to any other person, and the amounts due and payable to them respectively, shall be certified by the presidents and attested by the treasurers, respectively, under their corporate seal, a duplicate of each certificate shall be transmitted by the treasurer of each company to the State Treasurer, and the certificate given to each individual creditor for labour performed as aforesaid shall be received by the State Treasurer, and shall be paid by him to the holder thereof or to his order, and the amount so paid shall be deducted by the State Treasurer from the appropriations made to such turnpike road or bridge company: *Provided*, That if in the settlement of the accounts for work done, any misunderstanding should arise or shall have arisen to prevent a settlement of any account, the amount in dispute shall be certified to the State Treasurer, and shall be retained until the dispute shall be settled, and when thus certified, shall be considered as if settled agreeably to this section, so far as to enable the company to draw the surplus: *Provided also*, That if the certificate in possession of the creditors aforesaid of any company, thus presented to the State Treasurer shall exceed the total amount to be drawn, the same shall be paid *pro rata*: *And Provided further*, That nothing herein contained shall extend to the section making an appropriation to the centre turpike road leading from *Reading* to *Sunbury*.

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depending, the relator was entitled to a certificate, on which immediate payment should not be received from the treasury. The Act of Assembly provides for both cases.

Rogers for the defendant.

The Act of Assembly was made for the benefit of the company. It gives them a subscription of 10,000 dollars, for which warrants are to be drawn on the State Treasurer. But the company has a discretion as to the time of drawing their order. Perhaps, they might not choose to accept the subscription on the terms prescribed, viz. that the State should be taken as a subscriber for 10,000 dollars. Before they draw their order they will give certificates. As to the judgment for 1899 dollars 20 cents, the answer of the company is a complete bar to further proceeding in the mandamus.

PER CURIAM.—As to the judgment for 1899 dollars 20 cents, the return made by the defendants shews sufficient cause against the mandamus. If that return is false, the injured party has his remedy by action. But as to the other sum of 4989 dollars 20 cents, the return is insufficient—It is the duty of the defendants to give a certificate immediately; they have no discretion on that point. The certificate will be a security to the relator, and no injury to the defendants, because they return that claim, as being in dispute—and it is a case expressly provided for by the Act of Assembly—as to the certificate for that sum therefore, it is the opinion of the Court that a peremptory mandamus be issued.

Peremptory mandamus awarded.

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DORSHEIMER *against* BUCHER administrator of BOAS.

IN ERROR.

Friday, June 1.

ERROR to the Court of Common Pleas of *Dauphin* county, in which a bill of exceptions was returned.

Bucher, The plaintiff below, (the administrator of *Jacob Boas*,) had obtained a judgment against *Dorsheimer*, the defendant below, and plaintiff in error, on which a *scire facias post annum et diem* was issued, to which the defendant pleaded payment and set off. After the judgment, *Dorsheimer* paid a bond, in which he had been bound together with *Boas*, and as security for him. The question was, whether the defendant could set off a debt paid by him, as security in a bond for *Boas*, after the judgment on which this *scire facias* was brought. The Court below rejected the set off.

Hopkins, for the plaintiff in error, cited *Murray* v *Williamson*, 3 *Binn.* 135.

Elder, contra, contended that set offs must be in the same right. If this set off is sustained, *Dorsheimer* will get the whole of his debt, from *Boas's* estate, when *Boas's* other creditors, of equal degree, will get but a share: for *Boas's* estate will pay about half his specialty debts, or perhaps a little more. When the judgment was obtained, the debt due from the defendant became assets, and no subsequent transactions can be looked to.

If an administrator obtain judgment against a debtor of his intestate, and afterwards the defendant pay a sum of money as security in a bond for the intestate, the defendant may, in a *scire facias post annum et diem* on the judgment, avail himself of such payment, as an equitable defence.

But if the intestate has left assets to pay only in part his specialty creditors, the defendant is entitled to a discount only of the *pro rata* proportion, which the estate would have had to pay to the obligee.

PER CURIAM.—This payment is not properly matter of set off, but affords ground for an equitable defence. At the time when the plaintiff obtained judgment, the defendant had no cause of action against him as administrator of *Boas*, because at that time he had made no payment on the bond on which he was bound as security, consequently the administrator of *Boas* was accountable to his creditors for the amount of that judgment. The estate of *Boas* falls short of his specialty

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debts, so that if suit had been brought against his administrator, by the obligee of the bond, in which *Boas* and *Dorsheimer* were bound, he could have recovered no more than his *pro rata* proportion of his debt. The most that can be done for *Dorsheimer*, is to place him in the situation of the obligee in the bond, and in that situation we think he ought to be placed. To give him more, would injure the other specialty creditors. If the plaintiff had sued out an execution and recovered the whole amount of his judgment against the defendant, before the defendant had paid the bond in which he was security, it would not have been possible for him in any form of action, to have recovered that money back ; but in as much as the payment made by the defendant has relieved the estate of *Boas* from the bond, it is equitable that the defendant should receive from that estate, (by way of discount in this suit) just as much as the estate would have been liable to pay on the bond, had the suit been brought against the administrator, that is to say, the *pro rata* proportion.

Judgment reversed, and a *venire facias de novo* awarded.

WITHERS and others *against* GILLESPY.

Monday, June 4.

IN ERROR.

When books are produced on notice, and entries are read in evidence by the party calling for them, the party producing them may read other entries necessarily connected with the former entries, if made prior to the commencement of the suit

It seems however, that the rule is different if the party merely inspect the books, with a view to their being used.

The Court will notice the time of the commencement of the suit, as it appears in the record, though it is not stated in the bill of exceptions accompanying the record.

A deposition taken by a commissioner appointed by the defendants, (no person appearing on behalf of the plaintiffs,) is not evidence, if it appear that the witness had not answered one of the defendants' interrogatories, and had been examined, and had answered generally to the cross interogatories,—or that only a part of the cross interrogatories filed by the plaintiff were put and nswered.

ERROR to the Court of Common Pleas of *Lancaster* county.

This was an action of *assumpsit* brought by the plaintiff

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below, *James Gillespy*, against *John Withers*, *George Withers*, and *Michael Withers*, to *August* Term, 1812, to recover for work and labour performed for the defendants. The writ was sued out on the 27th *May*, 1812. On the trial in the Court below, the plaintiff having given in evidence the day book of the defendants, produced pursuant to notice from the plaintiff, and read therefrom certain entries in the different pages of the book, giving the plaintiff a credit of forty-three pounds and one shilling, for cutting a number of loads of wood, and having gone through his other evidence, the defendants to sustain the issues on their part, offered to read in evidence an entry on a different page of the same book. This entry bore date of the 30th *November*, 1812. The plaintiff objected to this evidence, and the Court overruled it. The defendants then cross examined *John Fulmer*, one of the plaintiff's witnesses, and again offered the same entry in evidence; but, on being again objected to by the plaintiff, it was again overruled by the Court, and an exception taken to the Court's opinion. The defendants also offered to read a different entry, in the same book, of the 30th *November*, 1812, charging the plaintiff with the sum of six pounds two shillings and eight pence, for provisions received by him. The plaintiff admitted that he had received provisions to the amount of six pounds two shillings and eight pence, but objected to the reading of this entry, and it was overruled by the Court, who sealed another bill of exceptions.

The defendants, having further cross examined *John Fulmer*, again offered the same entry last mentioned. It was again overruled by the Court, on being objected to by the plaintiff, and another bill of exceptions taken.

The defendants also offered in evidence the deposition of *James Blake*, a witness on his behalf, taken in *August*, 1818, before *Joseph Blackston*, commissioner, who was named as commissioner by the defendants, no person being named by the plaintiff, though they filed cross interrogatories; nor did any one attend the examination in behalf of the plaintiff. The objection to this deposition was, that the witness had not answered one of the defendants' own interrogatories, (*viz.* Do you know any other matter or thing, material to the

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parties in this cause, or either of them?) and that he had been examined, and answered generally to all the plaintiff's interrogatories. The plaintiff objected to this deposition, and the Court overruled it: The plaintiff thereupon excepted to the Court's opinion.

The defendants further offered in evidence another deposition of *Bernard Cummin*, a witness on his behalf, taken before the same commissioner, in *August*, 1819. Only two, out of the five cross interrogatories put by the plaintiff, appeared, by the examination returned, to have been put to the witness. This deposition being objected to by the plaintiff, the Court rejected it as improperly executed, and the defendants took another exception.

Hopkins, for the plaintiffs in error.

The three bills of exceptions, respecting the entries in the day book, are, in effect, on the same point, and may be considered together. The defendants produced their book, on notice from the plaintiff, who read certain entries in it: the defendants then offered to read other entries in the same book. These, it is admitted, were not evidence *per se*, but became so, in consequence of the plaintiff's having made use of the book as evidence. *Phill. Ev.* 211. 338, note.

The depositions of *Blake* and *Cummin* were rejected, as not duly executed. We say that the interrogatories were answered in substance though not in form. As no commissioner was named by the plaintiff, the one named by the defendants must be considered as the commissioner of both, and defects of form will be aided. *Stewart* v. *Ross*, 2 *Dall.* 157. 1 *Yeates*, 148, *S. C. Vaughan* v. *Blanchard*, 1 *Yeates*, 192.

Buchanan, contra, confessed that, in general, if one party calls for the book of the other, and uses it as evidence for himself, he renders the rest of the book evidence for his adversary. But the present case forms an exception, because the entries offered by the defendants were made after this suit was commenced. This need not appear in the bill of exceptions, if it be shewn in the record accompanying it, though where the record is not tacked to it, it must appear in the

bill. *Bull. N. P.* 317. As to one of the entries, the plaintiff admitted that he had received provisions to the amount of six pounds two shillings and eightpence, and therefore the judgment cannot be reversed for the rejection of evidence as to that article.

As to the depositions, the questions put were not answered. The commissioner was appointed by the defendants only. The interrogatories should have been put distinctly on the part both of the plaintiff and defendants, and the consequence of omitting to do so has been, that the answers are indistinct. In *Stewart* v. *Ross*, 2 *Dall.* 157. 1 *Yeates*, 141, *S. C.*, the plaintiff was present when the depositions were taken. Hence the Court considered the irregularity as waived. Where interrogatories are answered generally, and not fully, the deposition is bad. *Miller* v. *Dowdle*, 1 *Yeates*, 404.

In *Harrison's Chancery Practice*, 327, the manner of executing commissions, is stated. The witnesses were sworn to make true answers to the interrogatories, and not generally to tell the truth, the whole truth, and nothing but the truth. It follows, that each interrogatory might be put to the witness, who is under examination.

Hopkins, in reply, insisted that the Court was confined to the bill of exceptions, and cannot take notice of any thing out of it, and that the time of bringing the suit, did not appear in the bill. The cause was not at issue, till after the date of the entry in the defendants' book. As to the plaintiff's admitting, that he had received provisions from the defendants, that does not deprive them of the right to prove it by their book. In respect to the execution of the commissions, great allowance should be made for the difficulties that attend their execution. They are executed through courtesy, and often by unlearned men. In the case of *Miller* v *Dowdle*, 1 *Yeates*, 404, the interrogatories were not answered at all. Besides the objections came too late. Complaint should have been made to the Court to have the commissions suppressed, that others might issue. *Hopkins* then endeavoured to shew, that the interrogatories had all been substantially answered.

The opinion of the Court was delivered by

GIBSON J.—The first three bills of exceptions contain exactly the same point and may be considered together. The

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plaintiff having given in evidence from the defendants' book produced on notice, two entries by which he had received a credit for work and labour done; the defendants offered in evidence two other entries in a different page in the same book, and of a date subsequent to the commencement of the suit, which were rejected; and this is the first error assigned. The rule that books produced on notice and used, become evidence against, as well as for, the party calling for them, seems to rest on the same grounds as that which requires the whole of an admission or confession to be taken together to shew the exact meaning of the part relied on; and if so, it must be subject to the same limitations. The only thing peculiar to it is, that the books need not be actually used; for if inspected with a view to be used, they are, it is said, equally evidence for both sides: the reason is, that it would give an unconscionable advantage, to enable a party to pry into his antagonists affairs, for the purpose of compelling him to furnish evidence against himself, without, at the same time, subjecting him to the risque of making whatever he inspects, evidence for both parties. Reciprocity therefore appears to be the ground of the distinction. But the distinction itself has been denied, and, it seems to me, for reasons drawn from analogy, which render the argument almost insuperable. The notice, is a means employed in the room of a bill of discovery, for getting at evidence in the power of the opposite party, and only a different mode of arriving at the same end; and whether the evidence is disclosed by answer on oath, or produced on notice without it, can make no difference, except that it receives a sanction from the oath in the first case, which is wanting in the latter: yet the answer in chancery, with this additional claim to respect, is confessedly evidence only for the party who has obtained it. Indeed the distinction does not, at the present day, seem to be conclusively established either in this country or elsewhere: as may be seen in a note to *Clarkson* v. *Vanhorne*, 1 *Johns.* 394. But where books and papers are produced and used, there is no doubt but proof of authenticity is dispensed with, and that they are in evidence for both parties. In the case of books, however, which necessarily contain a variety of distinct and unconnected matters, the rule must be subject to limitations as to the extent of its operation. It cannot be pretended that the party pro-

ducing them, will be enabled to use them for the purpose of introducing matter impertinent to the issue, or indeed any other fact which they would not be competent to establish if the usual introductory evidence of authenticity had been previously given. Here the defendants were, for all purposes of explanation, entitled to the benefit of every thing necessarily connected with the entries relied on by the plaintiff, which their books contained at the time the suit was brought; but entries made afterwards, could avail them on no principle of evidence or reason. There would be little value in evidence thus procured, and, indeed, an end to proceeding by notice altogether, if after the suit was brought, and, it might be, notice actually received, the adverse party could sit down and make entries at pleasure, and insist on having these admitted to avoid the effects of previous entries, or to charge his antagonist on new and distinct grounds. It would be most unjust to say a party should neither use the entries in his adversaries books, nor give parol evidence of their contents, unless in connection with whatever the latter might choose to subjoin.

But it is contended that the whole ground of error should appear on the face of the bills of exceptions; and that as the plaintiff gave no evidence of the day of issuing the writ, or at least as no such evidence was introduced into the bill of exceptions, it cannot now judicially appear that the entries were of a date subsequent to the inception of the suit. It however appears from the record, that they were made after the term to which the action was brought. The object of the statute was to enable a party to bring on the record what would not otherwise appear; and although the plaintiff in error must confine himself to the objection taken at the trial, insomuch that no evidence will be intended to have been given which does not expressly appear, still the court are supposed to have had the record before them, and to have taken notice of the term to which the writ was returnable. By our practice, the bill of exceptions is part of the record, and always comes up with it; and for that reason the Judge is never called on to acknowledge his seal, which is necessary only where the bill of exceptions has not been tacked to the record. *Clarke* v. *Russell*, 3 *Dall.* 419. (in note), *Bull's N. P.* 317. Here the whole exception suffi-

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ciently appears of record; and I am of opinion the entries insisted on by the defendant, were properly excluded.

The second assignment of error relates to the rejection of two depositions, taken on separate commissions obtained by the defendants, and in which the plaintiff filed cross interrogatories. In one case the objection was, that the witness had not answered one of the defendant's own interrogatories, and that he had been examined and had answered *generally* to the cross interrogatories; and in the other, that only two out of five of the cross interrogatories appeared to have been either put or answered. It is too clear for argument that this evidence was properly rejected. The person employed to take the deposition was exclusively the commissioner of the defendants, and as it does not appear that any one attended on the part of the plaintiff, there is no ground to presume that any of his interrogatories were waived. It was therefore the business of the commissioner, distinctly to put to the witness all the questions proposed by the parties, particularly those of him against whom the evidence was to be used, and separately to note the answer to each. The witness is not sworn in chief but to answer the interrogatories which accompany the commission; and if the answers are noted in mass, it cannot satisfactorily appear that the opposite party has had the full benefit of a cross examination. The commission is, at best, but an imperfect means of extracting the whole truth, and one which, when not guarded by severe restrictions, is liable to be much abused. It is therefore no more than just that he who recurs to it, and whose duty it therefore is to see to its execution, should derive no benefit from it wherever there is the least room to suspect that every thing has not been fully complied with. In this matter Courts should never relax; for an adherence to form is the only security for a due attention to substance, and the only safeguard of the opposite party's rights. Here it is scarcely pretended that the execution of the commission was not defective; but it is argued that the proper course would have been, to move before the trial to have the depositions suppressed, and that an omission to do this was a waiver of every irregularity: but in this State, the practice of taking the exception at the trial is too firmly established to be questioned.

Judgment affirmed.

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Monday, June 4.

In Error.

ERROR to the court of Common Pleas of *Lancaster* county.

In a suit on a penal bill given for a legacy, where a principal point of dispute is, in what kind of money the legacy is payable, a witness may be examined by the legatee as to his knowledge of the value of the testator's estate: but evidence as to the general reputation of such value is not admissible.

Where a penal bill was given, conditioned for the payment of a legacy to the full satisfaction of the testator's widow, the mother of the legatee, it was *held*, that the declarations of the widow on her death bed that she was dissatisfied, and nothing could satisfy her but the payment of the legacy in specie, were not admissible in evidence in a suit on such penal bill: especially if the widow had settled an administration account as executrix of the testator, in which she received a credit for the payment of such legacy.

Where a long period of time has elapsed from the giving of a single bill for a legacy, the records of suits brought in the interval by the plaintiff against the executor, to recover the same, are evidence in a suit on such penal bill to rebut the presumption of payment arising from length of time.

No presumption of payment of a penal bill given for a legacy, arises from length of time, where a suit was brought by the legatee in fifteen years after the time when the legacy was payable, which abated by the marriage of the plaintiff, and another suit was brought eight years afterwards, and the plaintiff continued from that time endeavouring to obtain payment of the legacy: and it is immaterial what form of action was used if the recovery of the legacy was the object of the suit.

Where a legacy was bequeathed by a will dated the 27th of May, 1777, of 150 pounds, Pennsylvania currency, payable when the legatee came of age: the testator died in May 1779, and the legatee came of age in 1783: *held*, in a suit upon a penal bill given for such legacy, that the case was proper for auditors, under the 4th Sec. of the act of 5d April, 1781, and that the Court below erred in charging the jury, peremptorily, that the plaintiff was entitled to be paid in specie.

The Orphans' Court cannot receive payment of a legacy for the use of a legatee; when there is no suit pending, nor account settled; and therefore such payment by an executor cannot avail him, as valid.

A legatee is not concluded by a settlement in the Orphans' Court by an executor, to which the legatee is no party, in which the executor is credited for the payment of the legacy.

Query, Whether such a decree of the Orphans' Court would be conclusive evidence against a legatee of all receipts and disbursements on account of debts, funeral expenses, &c.

Query, Whether it would be *prima facie* evidence of the payment of the legacy.

Nor would the judgment of the Supreme Court on appeal from such decree, be more binding than the decree appealed from would have been.

This was an action brought by the defendants in error, *David Montgomery* and *Jane* his wife, against *William M'Cullough*, executor of *George M'Cullough*, deceased. The action was upon a penal bill dated the 14th *October*, 1779, whereby the said *George* bound himself to the said *Jane Montgomery*, (then *Jane Grubb*,) in the penalty of 300 pounds, *Pennsylvania currency*, conditioned for the payment to the said *Jane of her legacy as mentioned in her* father's will to the full satisfaction of her mother, the widow *Grubb*. Very soon after the date of this penal bill *George M'Cullough* married Mrs. *Grubb*, the mother of *Jane*, and sole executrix of the will of her husband, *Thomas Grubb*. This will was dated the 29th *May*, 1777, and the testator died in *May*, 1779. He bequeathed to his daughter *Jane*, besides specific legacies of a

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horse, saddle and bridle, with a bed and its furniture, *the sum of 150l. current money of the State of Pennsylvania, when she came to the age of eighteen years.*

On the trial of the cause in the Court below, the defendant took three bills of exceptions to the opinion of the Court admitting evidence offered by the plaintiffs in reply, and proposed eight questions, on which the opinion of the President was delivered in writing and placed on the record.

1st. The plaintiffs offered to prove by the oath of *Jeremiah Brown*, that *Thomas Grubb*, was considered the richest man in *Little Brittain* township, had about 1000 acres of land, "a large stock of cattle, and a great deal of personal property, which went into the hands of *George M'Cullough*, by his intermarriage with the widow." To this evidence the defendant objected, but the Court admitted it.

2d. Bill of exceptions. The plaintiffs offered to prove by *Levi Sidwell*, that after the death of *George M'Cullough*, *Isabella M'Cullough* late *Grubb*, when on her death bed, told him, that she was dissatisfied, and nothing could satisfy her, but the payment of the legacy to *Jane* in specie. To this evidence also the defendant objected, but the Court admitted it.

3d. Bill of exceptions. The plaintiffs offered in evidence the record of an action, brought to *June* Term, 1798, by *Jane Evans*, then a widow, now *Jane Montgomery*, one of the plaintiffs in this cause, against *George M'Cullough* and *Isabella* his wife, executors of *Thomas Grubb*, deceased, for the recovery of the legacy left to her by her father, the said *Thomas Grubb*—Also another record of a suit brought to *August* Term, 1806, by the present plaintiffs against the said *George M'Cullough* and wife, executors of the said *Thomas Grubb*, for the recovery of the same legacy, and a *scire facias* after the death of the said *George M'Cullough*, against his executor, in order to bring him in and make him a party to that suit. To this evidence the defendant objected, but the Court admitted it.

The defendant had given in evidence the following facts. On the 6th of *March*, 1781, *George M'Cullough* and wife, deposited in the Orphans' Court of *Lancaster* county 150*l.* in continental paper money, in payment of *Jane Grubb's* legacy,

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alleging that this identical money had been received in payment of a debt due to the estate of *Thomas Grubb*. On the 29th of *June*, 1791, the said *M'Cullough* and wife, settled in the Orphans' Court, their administration account on the estate of *Thomas Grubb*, in which they were credited for 150*l.* paid to *Jane Grubb* in full of her legacy. But being dissatisfied with the opinion of the Orphans' Court on several items of the account, they appealed to the Supreme Court at *January* Term, 1792, and that Court on the 20th of *March*, 1804, reversed the judgment of the Orphans' Court as to the sum of 87 pounds 10 shillings, directed to be charged against the accountant, and ordered that the accountant should be credited with that sum.

The Court were requested by the defendant to give the following matters, in charge to the jury.

1st. That the law is, that a bond not sued within twenty years after it becomes due, and on which there is no payment made, or acknowledgment of the obligor, is to be presumed paid without any evidence given of payment.

2d. That the jury, upon the plea of payment with leave, are bound to presume every thing paid, which in law or equity ought not to be paid.

3d. That the settlement in the Orphans' Court, the appeal to, and the decision of the Supreme Court thereon, is conclusive evidence of the satisfaction of the legacy by the credit therein obtained for the same.

4th. That the record of the Orphans' Court of the payment of the money into the Court, the settlement of the account in the Orphans' Court, the appeal to the Supreme Court, and its decree thereon, is plenary evidence of the full satisfaction of their mother, widow *Grubb*, according to the condition of the bond sued.

5th. The Court are requested to give in charge to the jury, that the bond sued upon in this cause, ought to be presumed satisfied by the jury under the evidence given.

6th. That there is no evidence in this cause to impugn the legal presumption that the bond is satisfied, from its age.

7th. That this bond, in its condition, is merely an engagement that the legacies are to be paid according to the will of *Thomas Grubb*, and in no other way, and if that will did not

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require it to be paid in specie, this bond did not create an obligation to pay it in specie.

8th. That current money of the State of *Pennsylvania*, means as used in the will of *Thomas Grubb*, lawful money, which continental money was at the making; and that as the bond sued refers to the will, and engages the legacy shall be paid according to the will, nothing but the then current money or its value, could be demanded upon the obligation.

No interest can be recovered upon a legacy, until after a demand is made of it.

Charge of the Court.

This is an action on an obligation entered into on the 14th of *October*, 1779, whereby the testator, *George M'Cullough*, bound himself to pay to *Jane*, now the wife of *David Montgomery*, the legacy of 150*l.*, bequeathed to her by the will of her father, *Thomas Grubb*, when she arrived at the age of eighteen, to the full satisfaction of her mother, widow *Grubb*.

To this action, the defendant has pleaded payment, with leave to give the special matters in evidence, and under this plea, the jury are to take into consideration all the circumstances legally given in evidence, and are bound to presume every thing to be paid, which in law, equity, and good conscience, ought not to be paid.

The defence in this case, rests principally upon two grounds, first, the length of time which elapsed from the period at which this bond was made payable, and the time at which the present suit was instituted. And, second, the payment of the money into the hands of the clerk of the Orphans' Court, on the 6th of *March*, 1781, and the proceedings of the Orphans' Court, and of the Supreme Court, respecting the administration account of *George M'Cullough*, and wife, on the estate of *Thomas Grubb*, and the matters connected with it. I shall first consider the second of these two grounds.

The bond in question refers to the will of *Thomas Grubb*, and engages that the legacy shall be paid to *Jane Grubb*, according to the will, when she arrived at the age of eighteen years, to the full satisfaction of her mother, widow *Grubb*.

The will gives to *Jane Grubb*, the sum of one hundred and fifty pounds, current money of the State of *Pennsylvania*,

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when she comes to the age of eighteen years: and this sum could be legally paid, only in the money current in *Pennsylvania*, or its value at the time it is made payable. Continental money was not then current, and the payment cannot, we think, be settled and adjusted according to the scale established by the Act of 3d *April*, 1781.

We are asked to instruct you that the settlement in the Orphans' Court, the appeal to, and the decision of the Supreme Court thereon, are conclusive evidence of the satisfaction of the legacy by the credit therein obtained for the same, and that the record of the Orphans' Court of the payment of the money into the Court, the settlement of the account in the Orphans' Court, the appeal to the Supreme Court, and its decree thereon, are plenary evidence of the full satisfaction of their mother, widow *Grubb*, according to the condition of the bond.

I cannot thus instruct you, because I do not think that the law would bear me out in so doing. It does not appear to me, that there was any Act of Assembly, or other law, which authorised the payment of the money into Court at the time that it was made, so as in any manner to bind the parties to this suit; the subsequent proceedings could not render the transaction valid and binding, if it were not so at the time it was done; and as it appears to the Court to have been a mere nullity, it ought not to have any effect in this cause.

Under these impressions, we cannot think that these proceedings are plenary evidence of the full satisfaction of the widow *Grubb*, but that the matter was open to the evidence which was given on that point. On the ground of defence, connected with the length of time, the law is well settled, that when twenty years have elapsed after a bond becomes due, on which there is no payment made, or acknowledgment of the obligor, it is to be presumed paid, without any evidence given of payment.

But this is merely a presumption, which the law raises, liable to be repelled by evidence of facts, which are inconsistent with this presumption, such as a suit or an acknowledgment of the debt within the twenty years.

A suit brought within the twenty years, would destroy the presumption of payment. The plaintiff has produced the

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records of certain suits instituted in this Court against *George M'Cullough* and wife, who was executrix of *Thomas Grubb*. These suits were instituted for the amount of the legacies given by *Thomas Grubb*. *George M'Cullough*, the obligor in this bond, was a party to these suits. If the legacy were not paid, the bond was not paid. And it would seem to me, that the suits for the legacy, being instituted against the person who was also the obligor in the bond, would have the same effect as a suit for the amount of the bond given for the payment of the legacy; and would take the case out of the presumption, which the law would otherwise raise, in consequence of the lapse of time.

But it is for you to decide upon the facts. If you are of opinion, that there is no evidence in this case to impugn the legal presumption that the bond is satisfied from its age, your verdict will be in favour of the defendant.

But if you are of opinion that the legal presumption of payment, is repelled by the evidence, your verdict ought to be in favour of the plaintiffs, for the amount of the legacy bequeathed to *Jane*, the now wife of *David Montgomery*, by the will of *Thomas Grubb*, with interest from the time it was first demanded, of which you must judge as well as you can from the evidence.

Hopkins, for the plaintiff in error.

1. Bill of exceptions. The evidence was improper, because it was irrelevant to the issue. It was also hearsay evidence, and was intended to operate on the passions of the jury only. The inventory of *Thomas Grubb's* estate, was the proper evidence of the amount of that estate.

2. The evidence stated in the second bill of exceptions, was also erroneously admitted, because it was hearsay evidence. Mrs. *M'Cullough* might have been examined as a witness. In 2 *Johns. Rep.* 31. declarations of a testator after making his will, that he had been forced to execute the will, for fear of being murdered, were held not to be evidence.

3. The records stated in the third bill of exceptions were not evidence; first, because they were not between the same parties; secondly, not for the same subject matter; and thirdly, they were irrelevant.

As to the charge of the court.

1. The first question was answered properly, but the second was afterwards contradicted.

3. 4. & 5. The proceedings in the Orphans' Court are evidence, first, that the legacy to *Jane* was paid, and secondly, that it was paid to the satisfaction of the widow *Grubb*, according to the condition of the bond; and the decision of the Supreme Court on appeal, rendered it conclusive.

On the remaining points he contended that the charge was erroneous in stating that the legacy should be paid in specie; because the bond is a contract within the 1st and 2d sections of the act of 3d *April*, 1781, 1 *Dall. St. Laws*, 880, establishing a scale of depreciation. This act regulates all contracts, entered into between the 1st *January*, 1777, and the 1st *March*, 1781. In *May*, 1777, when the will was made, the depreciation was two and a half paper, for one specie dollar: when the testator died, it was twenty four for one; and in *October*, 1779, when the bond is dated, the depreciation was thirty for one. Now a bond is a contract within the meaning of the act: and therefore the defendant was not bound to pay in specie, but was entitled to allowance for depreciation, according to the act. In *Lee* v. *Biddis*, 1 *Dall. St. Laws*, 175, it is held, that current lawful money, means money current at the time of making the contract, and that parol evidence cannot be received to prove the contrary.

Jenkins, contra, considered the case in three points of view. 1. Were the payments on the 6th *March*, 1781, and the settlement in the Orphans' Court, reviewed by the Supreme Court, conclusive evidence of payment of the legacy. 2. If not paid in fact, was it paid in presumption of law. 3. Was this legacy such a debt, as should have been scaled under the Act of 3d of *April*, 1781.

1st. The money was not deposited for safe keeping, but as a payment. Such payment was not authorised by any law. The legacy was not due; the legatee was then an infant and had a guardian, *William Arbuckle*, who was appointed guardian on the 6th *June*, 1780. The bond was to pay the legacy according to the will. It was not a vested legacy, but being given "when she arrived at the age of eighteen," it would have lapsed if she had died before eighteen. The

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pretended payment was two years and a half before she came to the age of eighteen, which was not till *August*, 1783. There was no law nor practice authorising such a deposit in the Orphans' Court. If the legacy had been due, it should have been paid to the guardian of the infant whose duty it would have been under the 4th section of the Act of 1713, (*Purd. Dig.* 408) to put it out at interest. The Court below therefore were right in deciding, that this pretended payment was a nullity, though recognised by the Orphans' Court. We had a right to go into the proceedings of the Orphans' Court and to deny the payments allowed by that Court. On the appeal to the Supreme Court, this point was not touched, nor could it have been, because it was *M'Cullough* who appealed.

On the first bill of exceptions, he contended, that as the defendant below alleged that the estate of *Grubb* was insolvent, the plaintiff had a right to shew that *Grubb* left a large estate, which came to the hands of the executor.

On the second bill of exceptions, he contended, that as the bond was conditioned to pay the legacy to the satisfaction of Mrs. *Grubb*, therefore the plaintiff had a right to prove that she was not satisfied. Her oath in the Orphans' Court, was under the influence of her husband. This Court has frequently decided that the proceedings of the Orphans' Court are not conclusive.

[The Court relieved Mr. *Jenkins* from speaking as to the admissibility of the records in evidence, to rebut the presumption of payment arising from length of time.]

Then as to the scaling of this debt, by the Act of 3d *April*, 1781. *Grubb* died in *May*, 1779, when 150*l.* were of very little value, too little to make any kind of provision for the daughter. He had a large landed estate, and gave a plantation to each of his sons. In *Grubb* v. *M'Cullough*, 1 *Yeates*, 193, a case is reported of a suit for legacies under this very will of *Thomas Grubb*, and auditors found that they were to be paid in value, equal to specie.

Tilghman, C. J. delivered the opinion of the Court.

David Montgomery and *Jane* his wife, who was a daughter

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of *Thomas Grubb*, deceased, the plaintiffs below, brought this suit against *William M'Cullough*, executor of the last will and testament of *George M'Cullough*, deceased, on a penal bill dated the 14th of *October*, 1779, whereby the said *George* bound himself to the said *Jane Montgomery*, (then *Jane Grubb*) in the penalty of 300 pounds *Pennsylvania currency*, conditioned for the payment to the said *Jane*, *of her legacy*, *as mentioned in her father's will*, *to the full satisfaction of her mother*, *the widow Grubb*; very soon after the date of this penal bill, *George M'Cullough* married Mrs. *Grubb*, the mother of *Jane*, and sole executrix of the will of her husband. *Thomas Grubb*. This will was dated the 27th of *May*, 1777, and the testator died in *May*, 1779. He bequeathed to his daughter *Jane*, besides a specific legacy of a horse, saddle, and bridle, with a bed and its furniture, the sum of 150*l. current money of the State of Pennsylvania when she came to the age of eighteen years*. On the trial of the cause, in the Court below, the defendant's counsel took three bills of exception to the opinion of the Court on points of evidence, and proposed eight questions, on which the opinion of the President was delivered in writing, and placed on the record.

It appears by the 1st bill of exceptions, that the plaintiff's counsel offered to prove by the oath of *Jeremiah Brown*, that "*Thomas Grubb* was considered the richest man in *Little Britain* township, had about 1000 acres of land, and a great deal of personal property, which went into the hands of *George M'Cullough*, by his intermarriage with the widow." To this evidence, the defendant objected, but the Court admitted it. A principal point of dispute on the trial, was, in what kind of money the legacy of *Jane*, the daughter of *Thomas Grubb*, was payable; that depended on the intent of the testator, which in cases of this kind may be shewn, by circumstances *dehors* the will. If the value of the testator's property, in specie, was small, and the amount of legacies bequeathed by him, great, it would afford a strong presumption, that he could not have intended that the legacies should be paid in specie. It was proper therefore to admit evidence of the value of his estate. But the evidence offered by the plaintiff, was of too loose a nature—*the general reputation of the value of the property*. The witness should have been confined to his own knowledge. Under that restriction he might have been per-

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mitted to testify, as to the value of *Grubb's* estate; but the Court suffered him to go farther, and in that there was error.

The 2d bill of exceptions shews, that the plaintiff offered to prove by the oath of *Levi Sidwell*, that "after the death of *George M'Cullough*, *Isabella M'Cullough*, late *Grubb*, when on her death-bed, told him, that she was dissatisfied, and nothing could satisfy her, but the payment of the legacy to *Jane*, in *specie*." To this evidence, also the defendant objected, but the Court admitted it. The general rule is, that declarations, not under oath, are not evidence. Mrs. *M'Cullough* might have been examined as a witness; the defendant had a right to the benefit of cross examining her, on oath, and such a cross examination was very necessary, as she had, together with her husband, *George M'Cullough*, settled an account of her administration on the estate of her first husband, *Thomas Grubb*, in which she had received credit, for 150*l.* paid to her daughter *Jane*, in full of this legacy: this account was settled, on her oath: clearly therefore, her subsequent declarations, without oath, that she was dissatisfied with the payment of the legacy, ought not to have been received.

By the 3d bill of exceptions, it appears, that the plaintiff offered in evidence, the record of an action brought to *June* Term, 1798, by *Jane Evans*, then a widow, now the wife of *David Montgomery*, and one of the plaintiffs in this cause, against *George M'Cullough* and *Isabella* his wife, executors of *Thomas Grubb*, deceased, for the recovery of the legacy, left to her, by her father the said *Thomas Grubb*; also another record, of a suit brought to *August* Term, 1806, by the present plaintiffs against the said *George M'Cullough* and wife, executors of the said *Thomas Grubb*, for the recovery of the same legacy, and a *scire facias*, after the death of the said *George M'Cullough*, against his executor, in order to bring him in, and make him a party to that suit. To this evidence, the defendant objected, but the Court admitted it. When it is considered, that this was offered as rebutting evidence, in order to remove the presumption of the payment of the legacy, arising from length of time, on which the defendant relied, it will appear at once, that it was evidence, material, and highly important. When a creditor suffers a long period of time to elapse, without demanding payment, or doing any act from which it may be inferred that he keeps up his claim, a strong presumption

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of payment arises; because the conduct of the creditor cannot otherwise be well accounted for. But there is no ground for such presumption, when it appears, that so far from remaining passive, the creditor has been prosecuting legal measures for the recovery of his demand. These records, therefore, were proper and powerful evidence, to rebut the presumption, set up by the defendant; and the Court was right in admitting them.

In order to judge of the opinion given by the President of the Court of Common Pleas, to the eight questions proposed by the defendant's counsel, it will be necessary to state some of the evidence given by the defendant. On the 6th *March*, 1781, *George M'Cullough* and wife, deposited in the Orphans' Court of *Lancaster* county, 150*l.* in continental paper money, in payment of *Jane Grubb's* legacy, alleging that this identical money had been received in payment of a debt due to the estate of *Thomas Grubb*. On the 29th of *June*, 1791, the said *M'Cullough* and wife, settled in the Orphans' Court their administration accounts on the estate of *Thomas Grubb*, in which they were credited for 150*l.*, paid to *Jane Grubb* in full of her legacy; but being dissatisfied with the opinion of the Orphans' Court on several items of the account, they appealed to the Supreme Court at *January* Term, 1792, and that Court, on the 20th *March*, 1804, reversed the judgment of the Orphans' Court, as to the sum of eighty seven pounds and two shillings, directed to be charged against the accountant, and ordered that the accountant should be credited with that sum.

The questions proposed to the Court below, though eight in number, may be reduced to three points. 1st. Ought the jury to have been directed to *presume* payment of the bond on which this suit was brought, or of the legacy which the bond was intended to secure. 2d. Was the bond, or the legacy, such a debt as ought to have been reduced to its value in specie, according to the scale of depreciation established by the act of 3d of *April*, 1781. 3d. Were the proceedings in the Orphans' Court, and the Supreme Court, conclusive evidence of the payment of *Jane Grubb's* legacy?

1st. It is very clear, that the length of time between the date of the bond and the commencement of this suit, considering all circumstances, afforded no ground for a presump-

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tion of payment. In general, when a debt is due on bond, and twenty years elapse, without any payment of principal or interest, or any demand of payment by the obligee, it must be presumed that the debt is paid, because it is contrary to the usual course of human affairs, that a creditor should acquiesce so long without receiving satisfaction. But the presumption ceases, when it appears that the creditor has not acquiesced, but endeavoured to obtain payment. Now in the first place, although this penal bill bears date in *October*, 1779, yet the legacy secured by it was not payable till the 8th of *August*, 1783, when *Jane Grubb* arrived at the age of eighteen years; counting from that period, it appears, that after the expiration of only fifteen years, *Jane Grubb*, then the widow *Evans*, commenced an action of debt against *George M'Cullough* and wife, for the recovery of her legacy. This suit was brought to *February* Term, 1798, and abated by the plaintiff's marriage with her present husband, *David Montgomery*. The action was renewed by the present plaintiffs, against *M'Cullough* and wife, to *August* Term, 1806, and from that time to the present moment, the plaintiffs have been endeavouring to obtain payment of the legacy, either by an action of debt, in which the legacy was demanded, or by an action on the penal bill of *George M'Cullough*. It is immaterial which form of action was used, for in either, the recovery of the legacy was the object of the suit. When the President of the Court of Common Pleas left it to the jury to determine upon this evidence, whether the usual presumption arising from length of time, was not rebutted by the circumstances of the case, he charged more favourably to the defendant, than he had any right to expect, for the charge might very properly have been, that, taking all things into consideration, no presumption of payment arose.

2. The President charged, that inasmuch as the legacy to *Jane Grubb* was not payable till her age of eighteen, at which time the continental paper money was not current; the case was not within the Act of *April*, 1781, and the plaintiff was entitled to recover the nominal amount of the legacy in specie. Was this opinion right or wrong? By the 4th Section of the Act of 3d *April*, 1781, it was enacted, that, "in all cases between debtors and creditors, *for debts or demands due and payable, or incurred before the* 1st *March*,

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1791, where the parties cannot otherwise agree, it shall be lawful for the Court to appoint auditors, who shall have full power to hear and examine the parties upon interrogatories, and also the witnesses, papers, and proofs, of the parties, and to liquidate and settle all debts and demands, and controversies subsisting between them, agreeably to the directions of this Act, where that can be done; *but in cases where the Act shall not apply*, then to settle the same according to equity and good conscience, upon due consideration had, of the nature and circumstances of the case." Now let us consider the nature of this case, and see how the Act of Assembly bears on it. Although the penal bill, on which this suit was brought, was a *contract* entered into between the 1st of *January*, 1777, and 1st of *March*, 1781, (in which case the Act of Assembly was to be applied, as appears by the 1st and 2d sections,) yet the real object of the obligation was, to secure the payment of a *legacy*, *which is not a contract;* and moreover, a legacy not payable till the year 1783; so that no suit could have been maintained on the penal bill, before the year 1783. It appears therefore, that this was one of the cases to be settled by auditors, according to equity and good conscience, and not subject to a peremptory reduction, by the scale of depreciation laid down in the Act of Assembly. And in truth, if ever there was a case, which called for a settlement according to equity and good conscience, it was this. It is extremely difficult, I might say impossible, to decide with certainty, what the testator intended. At the date of his will, (27th of *May*, 1777,) the scale of depreciation is, two and a half paper, for one specie dollar. At the testator's death, (*May*, 1779,) the difference between paper, and specie, was, as twenty-four to one. At that time, the will was consummate. Reckoning twenty-four for one, the legacy of four hundred dollars, was reduced to sixteen dollars and two thirds. Is it possible that a man of large fortune, who gave a tract of land to several of his sons, could mean to provide for his daughter, by giving her a horse, saddle, and bridle, and a bed, and furniture, with a legacy of only sixteen dollars and sixty-six cents? The question will not bear a moment's consideration. But what did he mean? Most probably he supposed, as was generally supposed, that before his daughter came to the age of eighteen, the currency

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of the country, (which both at the time of making his will, and at his death, was in a state of progressive depreciation,) would be fixed at the value it had sustained before the war. But auditors might do justice, by taking into consideration, the value of his estate, the circumstances of the times, and other matters which might throw light on the intention of the testator. We are not without authority to shew that this case should be settled by auditors. In *Levan's Adm.* v. *Frey*, 2 *Yeates*, 320, the action was debt, on an obligation, dated 9th *January*, 1779, conditioned for the payment of eighty pounds, on the 10th of *January*, 1780. The plaintiff offered to prove, that the bond was given in lieu of another bond between the same parties, for a debt contracted long before the revolutionary war. *Held*, that the case was proper for auditors, and not for a jury; and the Court declared, that if the plaintiff made out his case before auditors, he would be entitled to recover eighty pounds in specie, and interest. But what come home to the point, are the cases of *Joseph*, *John*, *Thomas*, *James*, and *Benjamin Grubb*, against these very executors, for legacies bequeathed by this same will, reported in 1 *Yeates*, 193. These five suits were referred to auditors who reported in favour of the plaintiffs, fixing the value of the legacies equal to specie. I am therefore of opinion, that it was going too far, for the Court below to say peremptorily, that the plaintiffs were entitled to recover the nominal amount of the legacy, in the present current money of the country. It would have been more proper, to refer the case to auditors, after the precedent in *Levan's Adm.* v. *Frey*.

3. But the third part remains for consideration. The defendant's counsel contends, that the proceedings in the Orphans' Court, and in the Supreme Court, on the appeal, are conclusive evidence of the payment of this legacy. If so, there is an end of the plaintiffs' action. Let us examine those proceedings then. As to the payment of four hundred dollars into the Orphans' Court, on the 6th of *March*, 1781, in satisfaction of the legacy bequeathed to *Jane Grubb*, it was, as a judicial proceeding, a mere nullity. The legacy was not due, *Jane* being under the age of eighteen; and if it had been due, it should have been paid to herself. There was no suit depending in the Orphans' Court, no account settled. And the reason assigned for the payment, was a

very bad one. For, granting that the depreciated paper had really been received, in payment of a debt due to the testator, it was unjust to throw the whole loss on the child, for the benefit of *George M'Cullough*, to whose wife the residue of the personal estate was devised, after payment of debts and legacies. Without doubt, the Orphans' Court travelled out of its jurisdiction, in receiving this deposit on account of the infant, and this the counsel for the plaintiffs concedes. But he relies on the subsequent settlement of the administration account, confirmed, as he supposes, so far as concerned the payment of this legacy, on an appeal to this Court. It is unnecessary to consider the general effect of settlements in the Orphans' Court. We are now on the subject of a *legacy*, and the question is, whether a legatee is concluded by a settlement to which he is no party, in which the executor is credited for the payment of the legacy. I have never heard of proceedings in the Orphans' Court, to compel payment of a legacy. There is no Act of Assembly authorising a suit of that kind, but there is an Act made expressly for the purpose of enabling legatees to sue for and recover their legacies in the Court of Common Pleas; which is a pretty strong indication of the sense of the Legislature, that the subject was not within the jurisdiction of the Orphans' Court. Now it would be most extraordinary indeed, if the Courts to whom jurisdiction in matters of legacy is assigned by positive law, should be concluded by an account settled in another Court, which did not possess that jurisdiction. Granting that a decree of the Orphans' Court would be at least *prima facie* evidence of all receipts and disbursements, on account of debts due to and from the testator's estate, funeral expenses, &c. (whether it would be conclusive against the legatee, as to these matters I give no opinion,) and supposing, for argument's sake, that it would be *prima facie* evidence of the payment of the legacy, upon which also I express no opinion, yet it is very certain, that it cannot be *conclusive* evidence of payment. As to the appeal to the Supreme Court, even if they had decided on the subject of the legacy, it would not have been conclusive, because the decision would have been made by them as a Court of Appeal, and therefore, not binding when they came to try the issue of payment in a suit at common law, for the recovery of the legacy; the judgment on the appeal,

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must partake of the nature of the judgment appealed from. Therefore, if the Orphans' Court could not make a conclusive decree, on the subject of payment of a legacy, neither would the decree of the Supreme Court be conclusive, when made on the same subject, in their appellate capacity. But the truth is, that the Supreme Court never made any decision on the subject of the legacy: the record shews, "that they reversed the decree of the Orphans' Court, as to the sum of eighty seven pounds, ten shillings, directed to be charged against the accountants, and ordered that the accountants should be credited with that sum"; and nothing more appears. Neither does it appear, that *Jane Grubb* was a party to the proceedings, either in the Orphans' Court, or in this Court. I am clearly of opinion, therefore, that the President of the Court below was right, in charging the jury, that these proceedings were not conclusive evidence of the payment of the legacy in question. On the whole, I am for reversing the judgment, and ordering another trial.

Judgment reversed, and a *venire de novo* awarded.

Miller surviving executor of Miller *against* Heller and another executors of Heller.

Monday, June 4.

In Error.

A. purchased land at Sheriff's sale as the property of B. B., being in possession, A. conveyed the land to C., with a covenant of special warranty against himself, and those claiming under him, and gave a bond, conditioned that he would deliver peaceable possession of the premises to C., or his heirs, at a certain date, and warrant, and forever defend them against the present possessor B., and all and every person attempting to hinder the said C., or his assigns, from taking possession thereof so as aforesaid, and against the said A., and his heirs or assigns. A, recovered possession by ejectment, and delivered the possession to C., who was afterwards ejected by a person claiming under B. *Held*, that the condition of the bond was not broken.

ERROR to the Court of Common Pleas of *Berks* county.

This was an action of debt brought by *Joseph Heller*, and *John Arter*, executors of *John Dieter Miller*, deceased, against

Jacob Miller, surviving executor of *George Miller* deceased, upon the following bond. 1821. *Lancaster.*

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"Know all men by these presents that I, *George Miller*, of *Windsor* township, in the county of *Berks* and State of *Pennsylvania*, yeoman, am held and firmly bound unto *John Dieter Heller*, of *Lower Saucon* township, in *Northampton* county, and aforesaid State, yeoman, in the sum of 1000*l.* gold and silver lawful money of *Pennsylvania*, to be paid to the said *John Dieter Heller*, or to his certain attorney, his heirs, executors, administrators, or assigns, to which payment well and truly to be made and done, I do bind myself, and my heirs, executors, administrators, and every one of them firmly, by these presents, sealed with my seal, dated the twenty ninth day of *December*, A. D. 1789.

"Whereas, *George Miller* abovesaid, by a certain assignment on a deed executed by the Sheriff of *Northumberland* county, to him the said *George Miller*, for certain premises therein described, did grant bargain, sell and convey the said premises by a warranty, in said assignment mentioned, unto him, the said *John Dieter Heller*, and to his heirs and assigns for ever. Now the condition of the above obligation is such, that if the above bounden *George Miller*, or his heirs shall and do *deliver peaceable possession* of said premises, to said *John Dieter Heller*, or his heirs, at or before the *fifteenth* day of *April* now next, and *warrant and defend the said premises* against the present possessor *Mounce Jones*, and *all* and every person *attempting to hinder* said *John Dieter Heller*, or his assigns from *taking* possession thereof, so *as aforesaid*, and against said *George Miller*, *and his heirs and assigns*; then the above obligation to be null, or else to be and remain in full force and virtue at law."

George Miller. [Seal.]

The parties, by agreement went to trial on the merits, without regard to the pleadings. The facts appeared to be, as follows:

George Miller had purchased certain land at Sheriff's sale, as the estate of *Mounce Jones*, and obtained the Sheriff's deed, on the 15th of *June*, 1789. On the 16th of *November*, *Mounce Jones* being then in possession, *George Miller* made

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an assignment to *John Dieter Heller*, of his title and interest in the land, with a covenant of warranty against him, and his heirs, and all claiming under him or them. *George Miller* brought an ejectment against *M. Jones*, in which he recovered possession, and delivered it to *John Dieter Heller*. Afterwards *John Dieter Heller* was evicted by *Nicholas Jones*, who claimed under *M. Jones*.

Two questions arose in the Court below, on which the charge of the Court was delivered favourably to the plaintiff.

1st. The first was on the extent of the covenants in the condition of the bond. The defendant below, contended that they related to the delivery of possession, on the 15th of *April* 1790, and that their object was, only to protect *John Dieter Heller* from being interrupted in taking possession, by *M. Jones*, or any other person, and contained a covenant as to title, against *George Miller* and his heirs only. The plaintiff insisted that the covenants in the bond, were for quiet enjoyment and warranty against *Mounce Jones*, and all claiming under him: and that as the testator was evicted by *Nicholas Jones*, claiming under *M. Jones*, the covenants were broken.

2d. The second point was the measure of the damages. The plaintiffs below contending, that the bond was given by way of an indemnity, and therefore *John Dieter Heller* was entitled to all the damages he had sustained; and that to indemnify him from them, he ought to recover the increased value of the lands, on the day of eviction, and the value of all its improvements at that time, and all the costs incurred in defending his title and possession; the defendant insisted, that if the eviction fell within the covenant, it should be considered entirely as a covenant of warranty, in which the value at the time of the conveyance, *viz.* the money paid with interest, could alone be recovered, without reference to the rise in value, or the improvements made by *John Dieter Heller*.

Evans and *Hopkins*, for the plaintiff in error, contended that the plain meaning of the condition of the bond, was, so far as related to *Mounce Jones*, and all other persons, to warrant the delivery of peaceable possession, and nothing further,

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and to this only the words extended. They cited *Sheph. Touch.* 364. 367. 375. *Wood's Inst.* 220. a. 7 *Bac. Ab.* (*Wils. Ed.*) *Warranty D.* 4 *Com. Dig.* 294. 2 *Caines*, 97. On the second point, they cited, 7 *Bac. Ab.* (*Wils. Ed.*) 239. note., *Bender* v. *Fromberger*, 4 *Dall.* 441., 9 *Johns*, 324.

Baird and *Buchanan*, contra, contended that the condition contained a warranty against *M. Jones*, which was the same as a warranty against the title of *M. Jones*; and was distinct from the covenant to deliver possession. They cited *Dy.* 425. *Vin.* 174. z. *a.* 3, and *Heller* v. *Jones*, 4 *Binn.* 61, in which the construction of this bond had been given by this Court. On the second point they cited *Cooper's Justinian*, 620. *Gainsworth* v. *Griffith*, 1 *Saund.* 58. 3 *Mass. Rep.* 545.

In reply, it was observed that in *Heller* v. *Jones*, this bond was not produced, but the Supreme Court was obliged to take it as had been proved by parol evidence, *viz.* as a bond of indemnity against the titles of all other persons.

The opinion of the Court was delivered by

DUNCAN J.—This was an action of debt on bond, in the penalty of 1000*l.*, with the following condition. [Here his honour stated the condition.] The parties went to trial on the merits by agreement, without regard to the pleadings.

The argument was principally confined to the exceptions to the charge of the Court, and branched out into two heads of inquiry. The first was, on the extent of the covenant in the condition; the plaintiff in error contending, that this only related to the delivery of possession, on the 15th *April*, 1790, its purpose being only to protect *Heller* from interruption in taking possession by *Mounce Jones*, or any other person, and contained a covenant against *George Miller*, and his heirs only, as to the title. The conveyance referred to in the bond was barely an assignment of the title and interest of *Miller*, with a covenant of warranty against him and his heirs, and all claiming under him and them.

The defendants contended, that the covenants were for quiet enjoyment, and warranty against *Mounce Jones*, and all claiming under him; and that as the testator was evicted by *Nicholas Jones*, the covenants are broken.

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The second was, the measure of damages: the defendants in error contending, that the bond was given for indemnity, and therefore they were entitled to all the damages they had sustained; that it was intended to keep them whole; a stipulation for actual compensation; and to satisfy them for the real value of the land, with all its improvements, on the day of eviction, and all costs, in defending the possession and title. It was admitted that if the pleadings had been drawn up at large, the breach assigned would have been the eviction by *Nicholas Jones*, claiming under *Mounce Jones*, and likewise that *George Miller* claimed under *Mounce Jones*. It was further admitted, that *Miller* recovered in full against *Mounce Jones*, and delivered possession to *Heller*. While the plaintiff insists, that if the eviction falls within the covenant, it should be considered entirely as a covenant of warranty, in which the value at the time of conveyance, the money paid with interest without relation to the rise in value or the improvements made by *Heller* could alone be recovered. If the Court should be of opinion with the defendant on the first point, it will become unnecessary to give one on the second; as that goes to the foundation of the right to recover any thing.

There is one rule which enters into the construction of all deeds;—they are to be construed agreeably to the intention of the parties, "and that intention ought to be adjudged of the several parts of the deed, as a general issue out of the evidence. Intent ought to be picked out of every part, and not out of one word only." *Winch*, 98. At present, the chief object of Courts of law is, to discover the true meaning of the parties to any contract, and to construe it accordingly. It is proper to consider the state of the parties and the property, when the bond was given, and determine from that and the whole condition, the purpose for which it was given, without rejecting any word, if consistent effect can be given to it. *George Miller* had purchased the land, as the estate of *Mounce Jones*, and obtained the Sheriff's deed on the 15th *June*, 1789; and conveyed to *Heller*, on the 16th *November*, *Mounce Jones* being then in possession. On the 29th *December*, he gave this bond, by which he bound himself to deliver possession on or before the 15th *April*, following.

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One thing we are assured of; that is, that *George Miller* never intended to *warrant* the title further, than as against himself and his heirs, and all claiming under him or them; for such is the special nature of the warranty in the assignment, and such is the concluding covenant in the bond. Now if the covenant was a general covenant as to quiet enjoyment, it would be quite inconsistent with the restricted covenant of warranty, as to the title; for then it must be said, that he intended to give a limited and an unlimited warranty. Our object is, to find out what is the meaning of the parties, without any regard to the place in which the covenants stand in theinstrument, or attention to grammatical rules. So far as respects the title, *Miller* had entered into all the covenants he intended. He had not, and he could not give immediate possession; for *Mounce Jones* held that; and the purpose of the parties, when the bond was given, was, to secure the delivery of *Jones's* possession to *Heller*. The condition is, "the said *George Miller* or his heirs shall and will deliver possession of the said premises to *John D. Heller*, at or before the 15th *April*." That is one covenant. "And warrant and forever defend the said premises against *Mounce Jones*, *the present proprietor*, and all and every person attempting to *hinder* said *John D. Heller* from taking possession thereof, *so as aforesaid*," is another distinct covenant. "And against the said *George Miller*, and his assigns," is a third covenant. These two last covenants are contained in one sentence, and throughout the sentence the warranty runs. It would be an unreasonable supposition, that *George Miller* intended to enter into a perpetual covenant against the tortious entries of *Mounce Jones* and all the world. For if the defendant's construction be a just one, it would include all hindrances, legal or illegal, by all persons, and to the end of time. This cannot be the fair construction of this instrument. The obtaining possession was the main design; and the whole of the first and second covenants refers to the possession. To the taking of possession as aforesaid, *Mounce Jones, and all and every person aud party* stand in the same relation, as to this covenant.

The covenant was a special covenant respecting the taking the possession—possession as aforesaid; that is, at the time *George Miller* covenanted to deliver it; and is an express co-

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venant, on the part of *George Miller*, that he will warrant that neither *Mounce Jones*, nor any other person, should attempt to hinder *Heller* in taking possession, on the aforesaid 15th *April*. It is not at all probable, or in any way to be accounted for, that this man, who was so cautious in warranting the title, should enter into covenant, to warrant and defend the possession for ever.

It is of some weight with me, that every covenant respecting *Mounce Jones*, is personal to him by name, and to him as the present possessor. I cannot suppose that this was accidental, and not intended to confine it to him, when in the same sentence, the covenant as to the title, is against *George Miller*, and his heirs and assigns, and not against him alone. I do not say, that if from the whole context it appeared, that the parties intended a perpetual covenant against *Mounce Jones*, and all claimers under him, but that the law might so construe it. But here there is nothing, which would irresistibly force this inference, but quite the contrary; and the Court ought not to indulge parties, in leaving out words, which are ordinarily introduced, and by which the real meaning of the parties might be understood; and this is increased by the omission in one covenant, and the insertion in another.

A covenant for quiet enjoyment, is very different from one warranting, that the grantee should meet with no hindrance in taking possession at or before a stated day fixed by the instrument. No breach of the covenant is alleged. It must be taken, that it was not broken, and that neither *Mounce Jones*, nor any other person, hindered him from taking that possession. I cannot put any other construction on these words, than that *George Miller* says—"I will not covenant for the goodness of my title, but I will covenant to deliver you possession, on the 15th of *April*, and will warrant, that in taking possession, you shall not be hindered by *Mounce Jones*, or any other person". Taking possession is one act, and not a succession of acts, and does not signify a continuance of possession; and *George Miller* says, "I will not enter into any warranty of the possession, I will not defend against any disturbance or interruption, except it is by myself, or my heirs and assigns; I will undertake to put you in possession, but not to keep you there". The present possession of *Mounce Jones*, and the delivery of the possession was all

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that was in the view of the parties or scope of the covenants. Looking at the instrument, this is the construction, and there is nothing so doubtful, or ambiguous in the covenants, as to require the conduct of the parties to be called in, to impose a different construction; there is no express covenant for quiet possession or enjoyment, and so material a covenant cannot be implied or added to it, by the conduct or declaration of the parties. Courts, both of law and equity, constantly advert to the situation of the parties and the property, in order to enable them to construe ambiguous and ill penned instruments; but it is now clearly settled, that in the construction of a deed or agreement, the acts of the parties cannot be taken into consideration, *Sugden*, 118; and parol evidence of the intention of the parties ought not to have been received. On the first argument, the acts of *Miller*, and his declarations, had their influence in the view which I then took of these covenants, and I was, I acknowledge, disposed to consider, that in this case, the parties themselves had put a construction on these covenants, and were therefore bound by it. I am now satisfied, this view was erroneous, and that all this evidence should be disregarded, and have no influence on the construction of the bond.

The clause respecting the possession, is one; but if they were distinct, the second would be consequential to the first. The just rule of construction, will be found in 1 *Saund.* 60, it is this—where any sentence contains distinct covenants, and there are words of restriction, either in the prefatory or concluding part; these words must be extended to every part of the sentence, unless the intention of the parties appears to require a contrary construction; there are many decisions confirming this rule, and some of them of a very early date. In *Broughton* v. *Conway*, *Moore*, 58, *Dyer*, 240, *a condition that vendor had not done or would not do* any act, to disturb the vendee, but that he should hold and enjoy, without the disturbance of vendor, or any other person, was confined to acts done by the former, because the latter words were referable to the former; and it is no breach, if the assignee be disturbed by the act of any other person, if it be without the act of the assignor, *Powell on Cont.* 403. So if one covenant that lands are of the value of 1000*l.* per annum, and so shall continue, notwithstanding any act done or to be done by him, the

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words, "notwithstanding any act," extend as well to the time of covenant made, as to the time future; and, though they be not of that value, the covenant will not be broken, except some act done by the covenantee be the cause of it. *Rich* v. *Rich*, *Cro. El.* 43, and *Gervis* v. *Peade*, 615. And again in 3 *Lev.* 46, there were four covenants: the first for seisin in fee, the second for right to convey, the third against incumbrances, and the fourth for quiet enjoyment. The first, third, and fourth covenants, were expressly restrained to the act of the grantor, his father, and grandfather, and the second was unrestricted. The whole Court agreed that the covenants were distinct and several, and three Justices, in opposition to NORTH, Ch. J., held, the first and second covenants were synonymous, and therefore as the grantor had covenanted against his own acts, it could not be intended, that he should immediately afterwards covenant against all the world.

A series of decisions has fixed a principle, that however general the words of a covenant may be, if standing alone, yet if from other covenants in the same deed, it is plainly and irresistibly to be inferred, that a party, could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words of any covenant in the same deed. The question therefore, always is, whether such irresistible inference does arise from concomitant covenants; if it does, they will control the general words of the covenant. It is not required here to restrain general expressions, by concomitant restrictive ones, for there is no general covenant for quiet enjoyment, or against disturbance, but a special one, respecting the taking possession, and not a covenant against interruption or disturbance of the possession, when it was acquired. It is not asked by the plaintiff in error, to restrain a general covenant by inference, and prune it down to a special one; but the defendants in error, require a construction to change a special covenant, and enlarge it into a general one, and introduce other covenants by inference, whilst so far from being a necessary inference, there is an irresistible inference to the contrary.

"Against *Mounce Jones*, and all other persons attempting to hinder *John D. Heller* from taking possession thereof, so

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as aforesaid, will warrant and for ever defend." To ascertain the sense of this, we have only to look to the line in the "instrument next above; that explains the general expression as aforesaid," and shews it to be, a taking possession, at or before the 15th *April*. If this was a general covenant for quiet possession and enjoyment, what would be the use of any other restricted covenant, for this would supersede them all; for a grantee might say, "I cannot sue you on the covenant for title, but I have a cause of action on a general covenant, for perpetual possession and quiet enjoyment." Taking possession is one act, limited here to a point of time: quiet enjoyment includes every thing, and is perpetual: into a covenant for the latter, *George Miller* did not enter, into the former he did, and that he fulfilled. If there had been a general covenant for quiet enjoyment, separate and distinct from the covenant for delivery of possession, it perhaps would not have been restrained by the restrictive covenant, as to delivery of possession, for that would be a covenant of a materially different import, and directed to a different object. The covevant for quiet enjoyment, is an assurance against the consequences of a defective title, and of any disturbances therefor; and if he be lawfully evicted, the grantor by such covenant, stipulates to indemnify him at all events. But the covenant for delivery of possession, and that there shall be no attempt to hinder him from taking possession at, or before a particular day, is a quite different covenant; it is a covenant against all acts of interruption, legal or illegal, with or without title, in taking the possession at the time stipulated, and when the possession is taken without *interruption*, that covevant has performed its office, and has no continuing obligation.

It has been with great earnestness pressed on the Court, that this bond has received a construction by this Court, in the case of *Heller & Miller* v. *Jones' lessee*, 4 *Binn.* 61. This is not so. The bond is called an indemnifying bond. The bond itself was not given in evidence, but in order to connect *Miller & Heller* in the action, *Nicholas Jones* v. *Mounce Jones*, and in the defence set up by *Miller*, to shew a fraud in the *scire facias* on the judgment, between the plaintiff and defendant in the proceedings, and that the whole was a contrivance to defeat *George Miller* of his judgment, and from the circumstances, to draw the conclusion that at the trial

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on the *scire facias*, *Heller* was virtually a party, and that this defence being set up in the suit, and a verdict against it, the verdict was conclusive between all parties and privies. Notice had been given *Heller* to produce this bond; he did not produce it, and evidence was given, that when *Miller* sold to *Heller*, he gave him a bond to indemnify him; but the bond was not given in evidence, nor parol evidence of its contents, otherwise than by the witness testifying, *that Miller had given Heller a bond of indemnity against the claims of others.* If the witness was under mistake as to the nature of the indemnity, *Heller* had an opportunity to shew that mistake, by producing the bond itself. But for the purpose, it was introduced, this bond would establish the connection with its special covenants equally as if it had contained general covenants. The case reported very fully shows, that this bond and its conditions, are now for the first time, to receive a judicial construction in this Court; and the Court are of opinion, that there was error in the Court of Common Pleas, in deciding that this breach, the eviction by *Nicholas Jones*, was within any of the covenants in the condition of the bond.

This makes it unnecessary to decide on the measure of damages which should obtain on a bond with a penalty, conditioned to warrant either title, perpetual possession, or quiet enjoyment, because the plaintiff in error is not liable at all, and there is no cause of action,—no breach assigned on record, falling within any of the covenants; and it would be giving an extra judicial decision, in a very important question, which ought always to be avoided. The judgment is therefore reversed.

Judgment reversed.

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IN ERROR.

June.

ERROR to the Court of Common Pleas of *Lancaster* county.

A declaration by a vendor, evincing a disposition to defraud, is not evidence against him in a subsequent and distinct transaction with another person, not then in contemplation.

Collateral parol promises made by the vendor, on the execution of articles, or of a deed, to indemnify the vendee against incumbrances, are merged in a warranty in the deed against those incumbrances, and cannot be taken advantage of in a suit for the purchase money, where they are not alleged as proofs of fraud. It follows, that any special damage sustained in consequence of the non-performance of such promises is not evidence in such suit.

It is sufficient in Pennsylvania, to entitle a vendor to relief against the payment of purchase money, on the ground of existing incumbrances, that eviction may take place: it is not necessary that an eviction at law should actually have taken place.

It seems, that if the most part of such incumbrances are discharged, the jury may allow for the residue in the verdict.

Where land is decreed to one heir by order of the Orphans' Court, the purchase money due the others, is a lien on the land; but a release by the children of one of these heirs who is dead, is binding in equity, and on every one but creditors, at law.

A quit rent out of the land sold, against which there is a covenant of warranty in the deed, is not to be estimated and deducted from the purchase money; but only the averages.

A justice of the peace cannot do an official act, or exercise a judicial function, out of his proper district or county. Therefore, an acknowledgment of a deed by a feme covert, taken in Lancaster county, before a justice of the peace of York county, for lands in York county, is void.

But if such feme covert afterwards joins as executor in a suit, to recover the purchase money for the lands conveyed by such deed, the invalidity of the deed is no objection to the plaintiff's recovery; for having affirmed the deed by the suit for the purchase money, she has made her election, and will be forever barred by the recovery, from claiming her dower.

This was an action of debt brought by *Mary Anderson* and others, executors of *James Anderson*, against *Henry Share* and *Christian Hershey*, senior, to recover the amount due on a bond, executed by *Henry Share* and *Christian Hershey*, senior, to the said *James Anderson*, conditioned for the payment of 50,000 dollars, on the 1st *May*, 1815, with interest from the 1st of *March*, 1814. On this bond the several sums of 600 dollars, and 700 dollars, had been paid and credited.

The defendants pleaded payment, with leave to give the special matters in evidence, and gave notice, that they would give the following matters in evidence:—That the title of the plaintiff's testator to the said lands, was defective and incumbered, at the time of the sale to the defendant, and continued and still is imperfect. That the defects in the title and incumbrances upon it, were concealed by the plain-

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tiff's testator, at the time of contracting, and when discovered, he engaged to the purchaser, that he should be no loser for want of them, and that he would immediately have them supplied and removed, and that the purchaser at any rate, should be no loser, or at no loss for want of them; on which engagements alone, the contract went into effect. That it was fully explained and made known to the plaintiff's testator, that part of the lands purchased, was for a town plot, to be laid out in lots, and that a complete title was expected and indispensable, and that such a one was promised, and indemnity against loss for want of it stipulated. That the defendant, upon the faith of the engagements of the plaintiff's testator, laid out the ground plot, of part of said lands, in a town, and made extensive and advantageous sales of great numbers of the lots at vendue, which sales were frustrated and defeated by the defendant's not getting a clear title from the seller; and not being able to give such an one to those to whom he sold, they refused payment to him. That in consequence of the title given by the seller being defective and incumbered, the whole object of the purchase was defeated and lost to the defendant, and a purchase, which otherwise would have been profitable, was rendered ruinously injurious. That very advantageous sales of other parts of the other lands purchased, were jeopardised and lost, from the title being defective and incumbered, which was neither supplied nor disincumbered, according to the sellers express stipulation, nor have these losses in any way been compensated by testator, under his express engagements so to do. That by the plaintiff's testator not complying with his engagements to the defendant, a purchase made for a specified object, fully made known in bargaining, and which alone appreciated the land beyond ordinary land, has been reduced in the hands of the purchaser to mere ordinary land in value, attendant with heavy losses besides, for which, he expects a reasonable compensation to be made him, by the return of so much of the money paid by him, as will make him whole for the losses he has sustained from the plaintiff's not fulfilling his engagements, and leave to the plaintiff, a full and adequate price for the lands sold under stipulations, never complied with by seller.

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It appeared by the evidence, that the bond in question was given in part of the consideration money, for the purchase of two tracts of land, the one situate in the county of *York*, and the other, in the county of *Lancaster*. The sum to be given for these two tracts was 110,000 dollars; of this amount, 61,300 dollars, had been paid and the balance due upon the bond in controversy constituted the residue of the consideration money. The payment of this bond was resisted, on the ground that the consideration for which it was given had failed, in as much as, at the time of the purchase, there were certain incumbrances on the property which affected the title to it.

The first evidence offered by the defendants, consisted of the articles of agreement, entered into between them and *James Anderson*, on the 4th of *October*, 1813.—By these articles, *James Anderson* covenanted and agreed, "that on or before the 15th of the same month of *October*, 1813, he would by good and sufficient deeds or instruments of writing, duly made and executed according to law, sufficiently convey and confirm the premises to the said *Henry Share* in fee;" that he should have full possession on the 1st of *March*, then next ensuing, and have the privilege of going on the land in the borough of *Marietta*, at any time, to lay off and draft the same for building lots, so far as the lease with *Snyder* would admit.

The defendants then proved from the records of the Orphans' Court of *York* county, of the 3d *June*, 1800, and of the Orphans' Court of *Lancaster* county, of the 15th *April*, 1800, that this estate was vested in *James Anderson*, on the terms of paying or securing to be paid, to the widow and children of his deceased father, their respective shares of this estate. The estate in *Lancaster* county, was appraised at 3295*l.*, and *James Anderson* the plaintiff's testator, was bound to pay to the widow the interest of 1098*l.* 16*s.* 8*d.* yearly, during her life, and after her death, that sum of 1098*l.* 16*s.* 8*d.*, was to be distributed among the legal representatives of the father. He was also bound to pay to *Margaret Anderson*, *Ruth*, *Thomas*, *Jane*, *John*, *Mary*, *William*, *Chalmer*, *Garland*, *Elizabeth* and *Eleanor Anderson*, the sum of 183*l.* 1*s.* 1½*d.*, each.

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The estate in *York* county, was appraised at 1740*l.* 3*s.*; it was adjuged to *James Anderson*, and he was to pay to the widow the interest of 580*l.* 1*s.*, being one third of the valuation money, annually, during her life; the principal to remain charged upon the land during her life, and on her death, to go to the legal representatives of his deceased father, and that the other two-thirds were to be distributed among the twelve children of the deceased, to each of them, 96*l.* 13*s.* 6*d.*

Testimony was given by Doctor *Watson*—that being sent for one morning he went to Mr. *Andersons;* Mr. *Share* and Mr. *Child*, came with the articles which were read over several times—that all seemed to be pleased with them, and they were duly executed. After their execution, and while Mr. *Anderson* was lying in bed, the witness whispered to him and asked him if he knew what he had done, he answered he thought he did. Witness told him, if he understood the articles, he had engaged to make a clear title in a very short time, and inquired of him if he had got releases from his step mother, and brothers and sisters, who as the witness conceived had some claim upon the property.—He said he had not, but would send off immediately and get them. Witness mentioned, that he thought he knew the step mother as well as he, and that she would not release. *Anderson* said he would compel her to release. Witness then asked him, if he had ever informed Mr. *Share* that the releases had not been obtained; he said he had not; witness advised him by all means to inform him while he was there, that if any thing should happen to prevent the releases being obtained, they might arrange the business. He answered he was very unwell and much exhausted, and wished the witness to do it. The witness then spoke to Mr. *Share* and mentioned, that Mr. *Anderson* had a stepmother, and some brothers and sisters, who had a claim and who had not yet released, but that Mr. *Anderson* would send off immediately and get them. Mr. *Anderson then spoke out, and said yes, I will send Abel off to-morrow or next day, and get them, and at any rate, you shall be at no loss or no loser for want of them. With this, Mr. Share appeared satisfied.* Mr. *Share* then mentioned, to *Mr. Anderson, that there were some other items in the articles he did not like. He said to Mr. Anderson, you know for what I bought this*

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property; that it was to sell again, and make as much out of it as I can, the times are now good, and the sooner I sell perhaps the better for me. He asked Mr. *Anderson*, if he had any objection to his bringing a surveyor and laying out the lands on the side of the river, the twenty odd acres, into town lots, Mr. *Anderson* said he could not give him any grant as to that, that the property was out on lease, and that he could not grant it till that lease was out, but if he could get the tenants permission, he might come and begin when he pleased. Mr. *Share* said he could get that, and appeared satisfied. *Henry Leibhart* testified, that he went to Mr. *Anderson's* house to take the acknowledgment of the deed, that Mr. *Share* finding that the releases had not been obtained, seemed to be a good deal dissatisfied. *That Mr. Anderson told him he need not be uneasy about that, for he would try and get the releases, and he should suffer no loss on that account. Then the deeds were executed; this conversation was just before the execution of the deeds. Mr. Share seemed to be satisfied with that promise.* On his cross examination, the witness said, that Mr. *Share* was present when the acknowledgment was taken; the deed was read to Mr. *Share*, and after that he appeared to be satisfied; it was read first, before he signed it; the witness thought, but was not certain, *Share* was satisfied before the deed was executed, and after *the promise was made.* Witness said that the deed was read shortly after he went there and then added, I can't tell whether the promise was made before or after the reading of the deeds, I rather think it was before, but cannot be certain.

Proof was also made of an endeavour on the part of *James Anderson*, to procure the releases. He sent a person into *Cumberland* county, who testified that *Thomas* and *John Anderson* were willing to release, but that their mother was unwilling; that *John Anderson* undertook to persuade her, and promised to come forward in a short time. The witness stated, that *Weakly's* children were under age, at the time; that they were requested to have guardians appointed. *Thomas* was appointed guardian for *Garland*, *Lamb* was married to *Jane Anderson*, and was willing to release. There was another sister of *James Anderson*, whom the witness did not find at home. That he reported to Mr. *Anderson*, the result of his errand and told him, that *John* would be in

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shortly, that he had got no release, but promises only, and that he did not recollect mentioning to Mr. *Share*, what he had done. Evidence was given also of the division of this property into lots; of the sale of them; of offers made for purchases, which were defeated on account of the existence of the incumbrances; of the property in *York* being within the manor of *Springetsburg*, and consequently subject to the payment of a certain quit rent to the late proprietary; and lastly, that the magistrate, who took the acknowledgment of the deed for the land in *York* county, was a justice of the peace for *York* county, and nevertheless took the acknowledgment of the deed in *Lancaster* county. After all this evidence was given, the defendants produced their deeds for the property in question.

On the part of the plaintiffs, evidence was given of a complete and indefeasible title to the lands in question, vested in *James Anderson*, the father of the plaintiff's testator. It appeared from the records of the Orphans' Court, of the county of *Lancaster*, and of that of the county of *York*, that *James Anderson* the father, died intestate, that this property was legally and duly appraised under the decree of the Orphans' Court, and that the Court in each county, under the authority given them by the law, ordered the whole to *James Anderson*, the plaintiff's testator, being the eldest son of the deceased, he paying or securing to be paid to the other children of the intestate, their equal and proportionable part of the true value of such lands. It appeared that *James Anderson* gave the security required—and by the proceedings of the Orphans' Court, it appeared that the persons entitled to a share of the estate of the intestate *James Anderson*, were his widow *Margaret*—*James*, the eldest son, *Margaret*, *Ruth*, *Thomas*, *Jane*, *John*, *Mary*, *William*, *Chalmer*, *Garland*, *Elizabeth* and *Eleanor*. The plaintiff produced the releases of the widow *Margaret Anderson*, of *Margaret* and *Jane Weakly*, two of the four children of *Nathaniel Weakly*, who married *Margaret Anderson*, the said *Nathaniel* and *Margaret* being both deceased—of *Thomas Williamson*, who married *Ruth Anderson*, now deceased—of *Thomas Anderson*, of *Samuel Lamb*, and *Jane* his wife, who was *Jane Anderson*, of *John Anderson*, of *William Anderson*, of *Chalmer Anderson*,

and of *Garland Anderson*. *Mary* and *Elizabeth Anderson*, being dead, their rights vested in their surviving brothers and sisters, and all the interest, vested in the parties to these releases, was relinquished and discharged.

These releases were all dated before the time at which the present suit was instituted, and consequently all claims were extinguished, except those of *James* and *Harriet Weakly*, who were entitled to one fourth of a tenth, and of *Eleanor Anderson*, who was entitled to a tenth.

Mr. *Gloninger* proved that he drew the deeds for this property; that Mr. *Share* called on him and furnished him with the materials and title deeds; that the copies of the records of the Orphans' Court of *Lancaster* and *York*, were wanting when *Share* first called, but that he afterwards produced them; that he produced the articles of agreement or a copy. When the witness mentioned the releases being wanting, Mr. *Share* said that the family were scattered, and he could not wait for them. Witness said he had to do as well as he could from the materials, that he did not know whether he read the deeds, but he explained to him particularly the clauses of warranty, and that he was impressed with the idea that those clauses were introduced for want of the releases. Evidence was then given of an agreement between *Henry Share*, *James Mehaffey*, *John Pedan*, *Matthias Bank*, *James Duffey*, and *John Hains*, of a settlement made between them, and of a division of the notes taken for the lands sold by them.

The Court were requested to give the following matters in charge to the Jury.

1. If a purchaser buy land at six times the value, for an avowed object, made known to the seller at the time of purchase, who agrees to convey, assure, and confirm the lands so purchased to the buyer in fee simple,—and from defect of title and incumbrances upon it, the buyer is prevented from using it for the object bought; that matter proved on the plea of payment with leave &c. to a bond for the purchase money, is good matter of defalcation against the bond.

2. That if the bargain, upon which the bond is given, is unreasonable and unconscionable, the jury have a right to de-

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falk and take off so much of it, as would make the bargain reasonable and just.

3. That either fraud, or want of consideration, if proved, are a good defence against a bond on the plea of payment, with leave to give the special matters in evidence, and that the seller giving the buyer a deed, does not prevent the defendant from using such defence.

4. Nor is it necessary, when the defendant shews a manifest defect or failure of title in part to the land, to shew an eviction thereof, to entitle him to a defalcation against a bond for the purchase money.

5. That when upon the execution of the deed, and giving the bond the seller makes, a collateral promise to the buyer, that if he accepts of the deed, as it is, and acts upon it, he shall suffer no loss, or be no loser thereby, and on the faith of that promise he does go on to appropriate the lands so purchased, to the specific object declared to the seller at the time of sale for which they were bought, and afterwards the object is defeated and rendered abortive, by the seller not removing the defects and incumbrances on the title, to which his promise related, and which at the time he made the promise, he engaged he would have immediately removed, the breach of such promise is a fair subject of defalcation against the bond, on the plea of payment with leave, &c.

The Court charged the jury, as follows.

It is contended, on the part of the defendants, that they have given direct and positive proof of fraud on the part of the grantor, in a studied concealment of the incumbrances, to which this property was subject, and that in consequence of the fraud and studied concealment, the grantee was imposed upon, and induced thereby to make the purchase, and to lay out the lands into lots. And they rely on the testimony of *Doctor Watson* and *Henry Leibhart*, as furnishing the proof of these allegations. Fraud is a mixed question of fact and law. It is for the jury to decide on facts, and for the Court to decide on the inference to be drawn from those facts. Fraud vitiates every contract, and if it should appear to your entire satisfaction, that *James Anderson* took pains to conceal from the grantee, all knowledge *of the incumbrances, and that from his studied conceal-*

ment of these incumbrances, Share was imposed upon, and persuaded to accept a deed, which he would not have taken; it would be such a fraud, as would entitle the grantee to rescind the bargain, and to consider it of no force or effect.

But fraud is not to be presumed; it must be made out by positive and direct testimony, or by the proof of such facts and circumstances, as are absolutely irreconcileable with the principles of justice and morality. But it seems to me that the fact relied on as evidence of fraud, is absolutely inconsistent with the belief, that there was any studied concealment of the incumbrances—whether *Henry Share* was previously acquainted with their existence, does not appear, but it is shewn, that at the instance of the grantor, *Doctor Watson* did inform Mr. *Share* of them, and that it was the intention of Mr. *Anderson* to send off, and have them removed. Mr. *Anderson* then spoke out, and said he would send off the morrow or next day, and get releases, and that at any rate, Mr. *Share* should not be a loser for the want of them; with this promise, Mr. *Share* appeared satisfied.

Share then had notice of these incumbrances immediately after the execution of the articles of agreement, and he had notice of them specifically from the records, which he procured for Mr. *Gloninger*, at the time the deeds were about to be executed. It appears that when Mr. *Share* found, that the releases were not obtained, he seemed to be a good deal dissatisfied; Mr. *Anderson* told him he need not be uneasy about it, that he would try and get the releases, and that *Share* should have no loss on that account. With all this knowledge then, Mr. *Share* accepted the deeds for the property in question. If Mr. *Share* meant to make any objections to the title, on account of these incumbrances, this was the time for making it. He was not obliged to take the deeds until the incumbrances were removed. But with a full knowledge of all the circumstances of the case, and all the difficulties which might attend it, he expressed himself satisfied, and accepted the deeds.

It becomes now necessary to attend to the operation of the deeds. The points which most materially affect this case, are those which contain the clauses of warranty.

In these, the grantor covenants that *Henry Share* may peaceably and quietly enjoy the premises, free, clear, and discharged, or well and sufficiently saved, and kept harmless

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of and from all former and other grants, dower, estate, charges, and incumbrances whatsoever, had, made, or done, by any person whatsoever.

There is also a covenant of warranty against the grantor, and his wife, and their heirs, and against the heirs, and representatives of his father *James Anderson*, and against all and every other person whatsoever, lawfully claiming or to claim the premises or any part thereof. It is the opinion of the Court, that the agreement of the 4th *October*, 1813, to give a good and sufficient title, was satisfied by the execution and delivery of the deeds, and their acceptance by Mr. *Share*. It will be proper to enquire also, into the effect which these deeds may have upon the case, as it relates to the parol testimony adduced by the defendants, *viz.* The testimony of Dr. *Watson* and *Henry Leibhart*, offered and received before the proof of the execution of any other deed than the articles of agreement.

The competency of the parol evidence could be maintained, after the production of the deeds, only on the ground of an allegation of fraud in the grantor, or on the principle, that the promise made by him was an independent engagement, and entirely distinct from that which was afterwards incorporated into the deeds. If you are of opinion that Anderson was guilty of fraud in the matter already mentioned, in concealing the incumbrances, and imposing upon the grantee, and persuading him to enter into contract, then the testimony was properly received, and you will give it that weight to which it is entitled. In any construction of this agreement, which is called an independent and collateral one, I do not perceive how it could be extended further than a promise by Anderson to indemnify against the claim of his step mother, and brothers, and sisters. "*The grantee was to suffer no loss on that account,*" *and in the utmost latitude*, it could not be intended to make him liable to a greater extent than the amount of the incumbrances, which were then within the contemplation of the parties. But in whatever point of light this agreement may be considered, it had in view the same subject matter, the same incumbrances, and the same extent of indemnification, which were provided for in the deeds of the 12th of *November*, 1813. If you are of opinion, that there was no fraud in the transaction, there is an end made of all parol agreements, respecting the conveyance of this land, or any

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thing relating to it, by the execution of the deeds. Dr. *Watson's* and *Henry Leibhart's* testimonies were admitted for the purpose of proving a fraud, if it could have been done. If it has not been proved, their testimony is to be altogether rejected. The rule is too reasonable and too well settled, to be now disturbed, that when an agreement is reduced to writing, all previous negotiations are resolved into the writing, as being the best evidence of the certainty of the agreement. The acceptance of the deed is an execution of the whole contract, and the rights and remedies of the parties, in relation to such contract, are to be determined by such deed, and the original agreement becomes null and void.

It cannot be a safe, and salutary rule to allow a contract to rest partly in writing and partly in parol. Whenever it is reduced to writing, that is to be considered as the evidence of the agreement, and every thing resting in parol becomes thereby extinguished or discharged. It is, says the Supreme Court of *New York*, (1 *Johns. Rep.* 416,) a new doctrine, that there can be a warranty in writing, and a warranty by parol in the same contract. The matter then rests upon the clauses of warranty contained in the deeds; the incumbrances were within the notice of the parties at the time of its execution; have they provided against them by special covenant? what is the construction to be put on these covenants, and what is the extent and nature of them. *James Anderson* having the fee simple in the lands, subject to the lien of the claims of his mother, and brothers and sisters, covenants, and agrees that the grantee shall peaceably and quietly enjoy the premises, free, clear, and discharged, or well and sufficiently saved and kept harmless, of and from all former grants, charges, and incumbrances whatsoever, had, made or done by any persons whatsoever. It is the opinion of the Court, that this provision in the deed respecting incumbrances, amounts to no more than a covenant to indemnify the grantee against all then existing charges, liens, or incumbrances upon the lands, and to the extent of those liens, charges, or incumbrances, and no further. And that the grantor is not liable for any subsequent acts of the grantee, or for any losses which might accrue from any dispositions of the lands, grants, agreement or speculation, to which he might afterwards be a party. *Under this view of the subject, it would be right to lay out of the case,*

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all the testimony which has been given, respecting the laying out of this land into lots, the agreements and settlements of the parties concerning it, the sales of those lots and any profit or loss accruing from the sales, or other dispositions of them. I say all the evidence respecting these matters, is to be rejected, and the case is to be considered as if no such evidence had been given, because in the correct decision of it, this evidence ought to have no weight. So, if there were no fraud or imposition in the case, we are to pay no attention to the real value of the lands, sold to the amount of the purchase money, or to the depression of the price, which afterwards took place, nor is it material to the grantor that he was made acquainted with the object for which the purchase was made, unless he was guilty of fraud, or studied concealment of some circumstance unknown to the purchaser, by which the object of the purchaser was defeated. With these matters we have no concern, we are only to determine upon the contract, solemnly entered into between the parties, and upon the meaning and extent of that contract. A Court of justice cannot, and ought not to make bargains for parties, or to determine in the case of a purchase, what one party ought to give, and the other to take. Considering then this case as divested of fraud, it becomes necessary to ascertain the amount of the incumbrances, with which this land was charged at the time of the suit brought, because the grantor can be liable, only for the amount of the incumbrances existing at the time, at which the suit upon the bond was commenced. If he had then paid off or obtained a discharge of all the incumbrances, he would be entitled to recover the whole amount due upon the bond, with the accruing interest; and the amount of incumbrances, then in existence, is all that he could be prevented from recovering. *The plaintiffs have proved, that all the shares and proportions of the stepmother and brothers and sisters of the plaintiff's testator, are released and discharged, except the interest of James and Harriet Weakly, who were two of the four children of Margaret the sister of the testator, and were each entitled to a fourth of their mother's share of the estate of the intestate, and except the interest of Eleanor Anderson, who was entitled to a tenth of the sum, at which the estate was appraised. It appears that this estate was included within the* Manor *of Springetsbury, and is subject to several years arrearages of quit*

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rent. Under a strict construction of the covenants in the deeds, warranting against all incumbrances, the arrearages of quit rents would be included within the warranty. It is also contended, that the widow of the plaintiff's testator, has a fair claim of dower upon the estate conveyed, inasmuch as the acknowledgment of the deed for the land in York county, was made in Lancaster county, before a justice of the peace of York county. The Act of Assembly, on this subject, directs that all bargains, and sales, and deeds and conveyances of lands, tenements and hereditaments may be recorded, but before the same shall be so recorded, the parties concerned shall procure the grantor, or bargainor named in every such deed, or else two or more of the witnesses, (who were present at the execution thereof) to come before one of the justices of the peace of the proper county where the lands lie, who is empowered to take such acknowledgment. The acknowledgment taken here is made in strict conformity, to the words of this Act of Assembly—it is made before a justice of the peace of the proper county, where the lands lie, and I am not satisfied, that it is inconsistent with its spirit. The taking an acknowledgment of a deed, is not local in its nature, it is a mere personal trust and confidence; and I am not prepared to say, that this acknowledgment is illegal. But the wife whose acknowledgment is objected to, is now a widow, and capable in her own rights of becoming a party to a contract, or of surrendering up any right which may be vested in her. She is a party to this suit, she has never made a claim of dower, and it appears to me that by her acting as executrix, and becoming a party to this suit, she would be debarred of any claim of dower which she might otherwise have. It is contended on the part of the plaintiffs, that the deeds containing a clause of indemnity against incumbrances, if any incumbrances exist, the remedy is on the covenant; and it is no defence to a suit on the bond for the consideration money, &c.; and that the incumbrances form no defence until it be shewn that there has been an eviction of the land by the party having a lien; or that the money has been paid by the defendants to the holders of the incumbrances, or in consequence of them, and to the extent of that payment, and no further. Upon a careful consideration of the law upon this subject, I do not think an eviction necessary, nor that there should be an actual payment of the amount of the incumbrances.

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In *Pennsylvania*, the law is different in many respects from that which prevails in other States. In *New York*, the chancellor says, that " if a person is in the actual enjoyment of land, and no person asserts, or takes any measure to assert a hostile claim, he cannot be permitted, on suggestion of a defect or failure of title, to stop the payment of the purchase money. Can this Court proceed to try the validity of the outstanding claim, in the absence of the party in whom it is supposed to reside? Or must he be brought into Court, against his will, to assert or renounce a title, which he never asserted, and perhaps never thought of? I apprehend, there is no such practice or doctrine in this country, and that a previous eviction or trial at law, is, as a general rule, indispensable. Perhaps an outstanding incumbrance, either admitted by the party, or shewn by the record, may form an exception, in cases of covenants against incumbrances." The purchaser then has a right to retain the amount of the incumbrances. You will ascertain what the amount of them is, and if there be no fraud in the case, the plaintiffs are entitled to your verdict for the balance.

During the trial, three bills of exception were taken by the defendants below, to the opinion of the Court, on points of evidence.

1. The defendants offered evidence to prove the solvency of the purchasers at *Henry Share's* sale of the lots laid out on the lands purchased, which sale took place on the 11th *December*, 1813, and that the purchasers refused to pay, on account of the incumbrances and defect of title. The plaintiffs objected to this evidence, and the Court overruled it.

2. The defendants offered to give in evidence, the records of several suits brought in the Common Pleas of *Lancaster* county, by *Henry Share*, against several of the purchasers of lots mentioned in the vendue list, heretofore given in evidence, and that *Share* was uniformly defeated in those suits, in consequence of the distributive shares of the stepmother of *James Anderson* and his brothers and sisters, in the valuation money of the estate not having been released. To which the plaintiffs objected, and the Court overruled it.

3. The defendants, in order to shew that the concealment by *James Anderson* from *Henry Share*, of the incumbrances

of his step mother, brothers and sisters, was fraudulent, offered to prove, that a short time before the date of the articles of agreement, *Anderson* offered to sell the property before mentioned to the witness, who told him that he had understood there were incumbrances on it, which had never been discharged, but at the same time informed *Anderson*, he did not believe what he heard, as he had before bought part of the same land, and got a deed from him, which shewed that the land was absolutely conveyed by his father to him; *Anderson* said, that those who said there were incumbrances upon the land, knew no better; that there were no incumbrances upon it: which testimony was objected to by the counsel of the defendant, and the objection sustained by the Court.

The jury found a verdict for the plaintiff, and judgment was rendered accordingly.

The plaintiffs in error in this Court assigned the following errors.

1. The Court erred, in not answering the questions, in their charge, propounded to them by the counsel for the defendant.

2. They also erred, in delivering it as their opinion to the jury, that a justice of the peace for the county of *York*, had authority to take the acknowledgment of a feme covert to a deed, in the county of *Lancaster*, conveying lands situate in the county of *York*: and that even if that were not the law, the feme covert, as executrix of her husband's will, being one of the plaintiffs in this suit, would have her right to dower extinguished.

3. They also erred, in overruling the testimony offered by the defendants, and for the rejection of which their counsel have taken three bills of exception.

4. They also erred, in instructing the jury, that notwithstanding *Henry Share* might have been induced to adhere to the articles of agreement, and accepted the deed, in consequence of an express promise made by *James Anderson*, that the releases should be obtained, and if they were not, that he (*Share*) should sustain no loss on that account, yet, that this promise was merged in the acceptance of the deed, and if it were not, the measure of damages would be, not

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the actual loss sustained in consequence of its breach, but merely the amount of incumbrances unpaid at the time of the institution of the suit.

5. They also erred, in stating it as their opinion to the jury, that the agreement of the 4th *October*, 1813, to give a sufficient title, was satisfied by the execution and delivery of the deed, and its acceptance by Mr. *Share*.

6. They also erred, in instructing the jury, that they should altogether disregard the testimony of Dr. *Watson* and *Henry Leibhart*, unless they were of opinion that *Anderson* was guilty of fraud.

7. They also erred, in instructing the jury, that it would be right to lay out of the case all the testimony which had been given, respecting the laying out of this land into lots, the agreement and settlement of the parties concerning it, the sales of those lots, and any profit or loss accruing from the sales or other dispositions; also, that if there was no fraud in the case, they should pay no attention to the real value of the lands sold, to the amount of the purchase money, or to the depression of the price which afterwards took place, nor is it material to the grantor, that he was made acquainted with the object for which the purchase was made, unless he were guilty of fraud, &c.

Buchanan and *Hopkins*, for the plaintiffs in error.

Jenkins and *Rogers*, contra.

TILGHMAN, C. J., took no part in the decision, having been absent during the argument.

The opinion of the Court was delivered by

GIBSON J. In the Court below, the defence was put on a supposed fraud of *James Anderson*, the plaintiff's testator, in procuring *Henry Share*, one of the defendants and the principal in the transaction, to purchase the land for which the bond was given: on the breach of a collateral agreement by *Anderson* to procure, within a specified period, certain incumbrances on the property to be extinguished: on the existence of some of those incumbrances, as still outstanding; and on a defective acknowledgment of the deed of convey-

ance by *Anderson's* wife, who is now an executrix of his will, and a plaintiff in the cause. Under some of these heads, may every principle be ranged, which the Court was called on to decide.

As to the first, the defendants had the benefit of their allegation to the extent of its value as supported by the evidence. The jury were instructed, that if *Anderson* the vendor took pains to conceal the incumbrances from *Share*, and thus induced him to accept a deed which he would not otherwise have done, it was such a fraud as entitled him to rescind the contract altogether; but the Judge at the same time expressed an opinion that the defendants had failed in their proof; and whether in this he were right or wrong is not for us to enquire. But an exception was taken to the rejection of evidence to prove that, a short time previous to the date of the articles, *Anderson* had offered to sell the property to the witness, who observed, he understood there were incumbrances on it, but that he did not believe it; and that *Anderson* replied that they, who said so, knew no better, for there were none. Now how this declaration, even granting, for the sake of the argument, that it evinced a disposition to cheat the person to whom it was made, could be called in aid of evidence of fraud in a subsequent and distinct transaction not then even in contemplation, is what I cannot comprehend. In this part of the case therefore, I discover no error.

Under the second head, a breach of the parol agreement was insisted on, not as failure of consideration of the bond, but as special damage collateral to the consideration; which, therefore could operate, if at all, only as a set off. It is unnecessary to decide whether, under the pleadings, a distinct substantive cause of action could be urged as a set off, as it is clear the parol promise could, under the circumstances of the case, have no operation in any shape. It was not pretended that this part of the defence, was connected with the allegation of fraud; but it was urged on the ground of the abstract effect of the promise itself, which, from its nature, carries with it an assertion of notice, and precludes the idea of *Share* having been unapprised of the existence of the incumbrances at the execution of the deed, or even at the date of the articles. Dr. *Watson* testified, that immediately after

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the articles were signed, he informed *Share*, at the request of *Anderson*, that there were liens; on which *Anderson* said he would procure releases of them, and that at all events *Share* should be no loser for want of them: and *Leibhart* swore, that immediately before the execution of the conveyance made pursuant to the articles, *Share* expressed dissatisfaction, because the releases had not been obtained; on which *Anderson* again told him not to be uneasy, for he should suffer no loss on that account, and *Share* being satisfied, the conveyance was then executed. This was all the evidence of the promise relied on. In *Pennsylvania* we have, unquestionably gone further in admitting the declarations of parties, made at the execution of a conveyance, than the decisions of any Chancellor would warrant; but this departure from the chancery rules of evidence, has been regretted by some of the soundest lawyers of the State, and every days experience proves its want of policy. In giving effect, therefore, to parol evidence of the intention of the parties to a written contract, I will never consent to go a jot beyond the adjudged cases, and in truth, I would much rather recede than advance. Here, however, we have a very different case; for the attempt is not to control the written agreement, but to set up a parol promise, independent of it, as the subject of a substantive and distinct remedy. Now there is no wiser rule, and certainly none better established, than that a contract shall not rest partly in writing and partly in parol. But further, the execution of a deed, being the solemn and deliberate creation of the evidence of the contract, is the consummation of all preparatory negociations and stipulations, even where there are articles of agreement: and this rule extends so far, that although there *may* be collateral covenants, not executed by delivery and acceptance of a deed, the law raises a presumption to the contrary, which can be rebutted only by a manifest inconsistency between the provisions of the deed and those of the articles. But here the deed contained a covenant of warranty against the very incumbrances that were the subject of the promises, and it would therefore be impossible, even if there could be such a thing as a collateral parol promise, to say that it was not merged in the deed; for if it were not, the purchaser might proceed at the same time on the promise and on the covenant: and, to say that he would be

bound to elect his remedy, or that he could recover only one satisfaction, admits the identity of the subject matter of the written and of the parol contract, and, in that view, is an argument in favour of the latter having merged in the former. The jury, therefore, were rightly directed, that unless the acceptance of the conveyance were procured by deceit, the declaration of the vendor ought to have no operation.

Under this head, also, may be ranked two bills of exceptions to the opinion of the Court, rejecting evidence of the solvency of persons to whom *Share* had sold certain portions of the land; and that they had defeated him by setting up these liens as a defence to suits brought for the purchase money. The evidence was offered to shew the nature and extent of the special damage suffered from the breach of the promise; and its competency, therefore, depended on whether the promise itself created any distinct responsibility that could have an effect on the event of the cause. I am of opinion it was properly excluded.

Then as to the third head. The effect of incumbrances as shewing failure of consideration or a defect in the title, is certainly different in *Pennsylvania* from what it is in *England*, where an eviction at law is an indispensible ingredient of a claim for relief against payment of the purchase money. Here it is sufficient that eviction *may* take place. How far then had the incumbrances in the present case been actually discharged, and were there any still outstanding, which the Court did not direct the jury to allow? The compensation decreed by the Orphans' Court, in lieu of the interest which the step mother and the twelve brothers and sisters of the vendor originally had in the estate, and which was divested by the decree confirming the estate in him, was a lien on the land; but all their respective shares had incontestably been discharged, except the share of one of the sisters, which, under the direction of the Court, was allowed in the verdict; and also the share of another sister, only half of which was allowed. The last mentioned sister had died leaving four children; two of whom had not released, and their part of their mother's share was consequently allowed; but the other two on coming of age had executed releases, the validity of which is denied, on the ground that the interest of the mother, having

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been turned into personalty by the decree of the Orphans' Court, could be released only by her personal representative, and not by her heirs, as these had no descendible interest in the money decreed to her. Such releases, I admit, are not valid at law; but they are undoubtedly valid in equity, and therefore good here, especially as the defendant sets up an equitable defence. If the money had been actually paid to the children to whom it was ultimately to go, would not chancery restrain an executor or administrator of the mother from prosecuting an action for it at law? Payment to the children would be good against every one but creditors, and here it does not appear that there were any; for we must intend the Judge said the releases were good only under the circumstances of the case, and as the evidence has not been brought before us by a bill of exceptions, we cannot say this was error. But these incumbrances were not, as seems to have been taken for granted at the trial, dependant for their effect on the covenant of warranty which was specially intended to protect against them; for this equitable defence rests not on the breach of a covenant, but on failure of consideration, and might have been equally urged if the conveyance had contained no warranty at all. There is however another incumbrance on which the warranty has a direct operation. The land lies within the manor of *Springetsbury*, and is subject to a quit rent to the heirs of the late proprietaries; and of these facts I will intend that the vendee was fully apprised, as the nature of the title must have led him to a knowledge of the first, and the reservation of quit rents in the proprietary manors, being not only a matter of public notoriety, but also recognised in the act which divested the right of the *Penn* family in their other lands, is to be considered as notice of the second. Under these circumstances it might admit of a doubt, whether a purchaser, even without a covenant against the quit rent, could retain any part of the purchase money. Where however there is notice of an incumbrance which is contingent, and the vendor covenants generally against incumbrances, the vendee will be considered as having chosen his remedy, and will not be permitted to retain. *Vane* v. *Lord Barnard*, *Gilb. Eq. Rep.* 6. Here if there had been no covenant, and the vendor had been ignorant of the existence of a quit rent, the jury might have deducted its

estimated value from the amount of their verdict: but the very circumstance of exacting a covenant against a known incumbrance which the vendee may extinguish, is inconsistent with an intention that more should be retained than what actually affected the land by being then due. It was contended that the whole value of the quit rent should have been estimated and deducted, but the Court directed the jury to allow only arrearages due at the time of the contract; and these, as being a present charge, were properly a subject of defence, on the same ground that the liens created by the proceedings in the Orphans' Court were allowed; but the vendee could not retain to meet charges accruing afterwards.

Lastly, as to the defect in the title. The acknowledgment of the conveyance in *Lancaster* county, although before a justice of the peace of *York* county in which the lands lie, was undoubtedly void. The taking of the separate examination of a feme covert is a judicial act, and, therefore, as local in its nature as any other within the compass of a justice's official duty, who can do no act nor exercise any judicial function out of his proper district or county. If jurisdiction were given to justices of the peace for considerations that relate only to their office or persons, it is not easy to discover any thing like a reason for the Legislature having attached *any* local qualification to it; for the magistrates of one county possess, in contemplation of law, as competent a share of talents and integrity as those of another; and therefore this official trust might, as to that, have been as well confided indiscriminately to all the justices in the State, as to those of the county where the lands lie. But although the dower of the vendor's widow was not barred by the acknowledgment of the conveyance, yet she prosecutes this suit in direct opposition to her right, and has therefore precluded herself from urging it hereafter. A party in her situation will never be permitted to affirm an act in part, and disaffirm it in part; but shall be put to his election to confirm it altogether or abandon it altogether. This principle, which is universal, and said to prevail in the laws of every country, is applicable to all interests, whether of femes covert or infants; whether immediate, remote or contingent; of value or of no value; and as well to deeds as to wills. It is this principle—that none

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shall claim in repugnant rights, and that he who would take the benefit shall not dispute the title,—which prevents a tenant from setting up title against his landlord. Whether the widow had a *beneficial* interest under the will is immaterial: her having joined in a suit to recover the price of a title, which was sold as a good one, was a determination of her election, which shall forever estop her from disputing the validity of the title, to which, after every legal disability was removed, she has thus become a party. The error in the charge of the Court respecting the acknowledgment of the deed, therefore, was one that did not prejudice the defendants; as the vendor's widow, who is an executrix of his will and one of the plaintiffs in the suit, ratified the sale and cured the defect in the title. The judgment is affirmed.

Judgment affirmed.

KAUFFELT with notice to BEAR, and other judgment creditors of DANIEL TREICHLER *against* BOWER.

June.

IN ERROR.

Where an absolute conveyance is made of land, a receipt given for the purchase money, and possession delivered to the vendee, part of the purchase money being paid, and the bond of the vendee, and a surety taken for the residue thereof, the vendor has not a lien for such residue of the purchase money, against judgment creditors of the vendee, whose judgments are subsequent to the conveyance, though they had notice that the balance of the purchase money remained due.

ERROR to the Court of Common Pleas of *York* county.

This action was brought in the Court below, by *Jacob Bower* against *John Kauffelt*, sheriff of *York* county, and the Court directed notice to be given to the judgment creditors of *Daniel Treichler*. It was instituted for the purpose of trying the right of the plaintiff to the purchase money arising from a sale by *Kauffelt* of a tract of land belonging to *Daniel Treichler*, and the following appeared on the trial in the Court below, to be the circumstances of the case.

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On the 3d of *December*, 1813, the following agreement under seal, was made between *Jacob Bower* and *Daniel Treichler*.

An article of a bargain, between *Jacob Bower*, in *Manchester* township, *York* county, on the one part, and *Daniel Treichler*, in *Donegal* township, in *Lancaster* county, on the other part, as follows, namely, *Jacob Bower* sells to *Daniel Treichler* his plantation adjoining *George Day*, *Abraham Leal*, the deceased *Matthias Gab*, and the river *Susquehanna*, containing seventy two acres and allowance, or the usual addition, (six acres), in the hundred. That is to say, *Jacob Bower* sells the aforesaid seventy two acres on the condition, when *Daniel Treichler* lets the land be surveyed, what it measures more than seventy two acres, that he has in the bargain for surveying. But if it measure less than the seventy two acres and the allowance, then *Bower* must deduct as much as it measures less. *Bower* sells the above mentioned piece of land, and all that is built, and planted on it, namely, two houses, one barn, and the grain in the ground by the acre, for the sum of three hundred dollars the acre, the half in hand, namely, till the first day of *April*, 1814, and the balance in five yearly payments. *Jacob Bower* promises *Daniel Treichler*, to give him a good and indisputable title by the first day of *April*, 1814, and possession when he has paid the hand money. *Bower* allows *Treichler* in the bargain, the half a fish pot, ten hogsheads, a ton of plaster, and the half the wheat fan. We the undersigned, bind ourselves the above mentioned bargain to keep and to fulfil, in the sum of $13,000. This we testify with hand and seal, this day 3d *December*, 1813.

Test.
Michael Quickel.
John Quickel.

Jacob his × mark *Bower.* [Seal.]
Daniel Treichler. [Seal.]

On the 7th *December*, 1813, articles of agreement were entered into between *Daniel Treichler* and *John Smith*, by which *Treichler* agreed to sell one half the land to *Smith*. On the 12th *April*, 1814, *Bower* and wife conveyed all their right and title to the property, to *Treichler* in fee, in consideration of the sum of 21,600 dollars, and on the same day

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Bower received one half the purchase money, namely, 10,800 dollars, and *Treichler* gave five bonds executed by himself and *John Smith*, each in the sum of 2,160 dollars, amounting altogether to the sum of 10,800 dollars, the residue, payable in five annual instalments. A receipt was at the same time given on the deed for the purchase money, the title papers were given up, and possession delivered. On the first of these bonds, 1,659 dollars were afterwards paid, and the residue of that, as well as the amount of the others remained unpaid. In *May*, 1814, an agreement was made between *Treichler*, *Smith*, and *Henry Cassel*, by which *Treichler* was to have one-third of the land, *Smith* one-third, and *Cassel* one-third; to be held as tenants in common; each to pay their proper proportion of the purchase money and expenses. The land conveyed to *Treichler* was levied upon by the defendant, as Sheriff, under a *fieri facias*, and sold by virtue of a *pluries venditioni exponas*, returnable to *January* Term, 1818. These writs were issued on a judgment obtained against *Treichler*, by *Jacob Bare*, on the 8th *June*, 1815. Judgments were also entered against *Treichler* on the 3d *February*, 1816, by *John Strickler* and *Christian Miller:* and on the 1st *June*, 1816, by *Abraham Shock*. These were the judgment creditors to whom notice of this suit had been given. The Sheriff sold the property to *George Wagan* for 5,480 dollars, who paid the amount into the Sheriff's hands, and received a Sheriff's deed for the land.

A witness, on the part of the plaintiff, who drew the deed and bonds, proved, that *Bower* and *Treichler* called on him together, some time before the deed was made; and *Treichler* told him to have it made. He asked *Treichler* the name of the company: *Treichler* said he would speak to them about it, and requested the witness to let the business rest. He afterwards called, and requested the deed to be made to himself, and the bonds to be drawn in the name of himself and *Smith*. He said the lands would be laid out in lots, and he could make the conveyances himself. After the writings were drawn, the witness saw *Bower*, *Treichler*, and *Smith* together, and the writings were executed. *Smith* paid his part of the purchase money. *Treichler* had not enough of the hand money, but gave his bond for it. When he read

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the bonds, *Bower* asked why *Cassel's* name was not in. Witness said, he knew nothing of *Cassel;* he was told of no other person than *Smith* by *Treichler*. *Smith* said he need not be uneasy, it made no odds: *Cassel* would sign the bonds at any time, when requested: and said he could not be there at that time. *Bower* seemed easy, and the bonds were executed. About a year after, *Bower* told the witness, he had heard *Treichler* was in a tottering situation, and he was afraid he would lose his money. The witness told him he need not be uneasy, he had *Smith*, who was able: he said *no*, he was not worth as much as the other. The witness advised him to get *Cassel* to sign the bonds. *Bower* went with *Treichler* to *Cassel*, who put his name to the bonds, and gave *Bower* $100. *Bower* seemed then satisfied. *Smith* was then in possession.

For the defendant, *Treichler* was examined, who proved, that he bought the land for himself at the time, and had then no concern with any body; and nothing was said to *Bower* about any body being concerned with him. After the articles were made, *Smith* told him, he (the witness) had fallen into his bargain; he was going to buy it. He desired the witness to let him go in as partner; he would give him *Henry Cassel* as security. He told the witness, he should go to *Marietta*, and he would draw some kind of an article; and the witness went there; they met at *Marietta*, *Smith*, *Henry Cassel*, and himself. *Smith* told the witness to get the article drawn; and the article was drawn. The witness sold one-half of the land to *Smith*. When the time for executing the deed came, he gave *Smith* as bail to *Bower*, and he agreed to take him. Upwards of $13,000 were paid. *Bower* afterwards wanted more bail, and in the fall of 1816, he came to the witness, and told him to go with him to *Cassel*. He went with *Bower*. He said he wanted *Cassel* to sign the bonds; to go in the bonds as bail. The witness spoke to *Cassel* in private, and desired *Cassel* to sign the bonds, and *Bower* requested it also. *Cassel* did not object, but signed them. *Bower* was told shortly after this article of the connection with *Smith*. He guessed *Bower* knew all about it: it is very likely he had told him. The property was to be laid out in a

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town. *Smith* was then the partner; nobody else had then entered in. *Cassel* had put his name to the article when it was executed. He said he put his name there, as bail, as security. He understood *Cassel* was to get a share of *Smith*. He told *Bower*, *Cassel* was to have a share in it. He thought it was agreed between those three, that the deed should be made to him. *Smith* was the partner. The witness thought *Smith* mentioned that *Cassel* was to have a share.

Three bills of exceptions in relation to the evidence, were taken by the defendant below, but as the Court did not decide upon them, it is unnecessary to detail them.

The opinion of the Court was requested on the following points.

1. That all deeds are to be interpreted according to the intention of the parties, appearing from the language of them, and that as the article reserves the land as security for the first payment, it impliedly relinquishes it as to the rest.

2. That in every case, where the equity of the case is equal between the plaintiff and defendant, he who has the legal right must prevail.

3. That by deed, executed on the 12th of *April*, 1814, by *Jacob Bower* the plaintiff to *Daniel Treichler*, the legal title to the whole tract of land was in *Daniel Treichler*; and that *Jacob Bare's* judgment in the Common Pleas of *York* county, on the 8th of *June*, 1815, and also *Daniel Treichler's*, bound, and was a legal lien and incumbrance on that tract of land so conveyed to *Treichler*; from which land, the lien was excluded by the terms of the deed.

4. That upon *Jacob Bower's* executing to *Daniel Treichler* the deed of the 12th of *April*, 1814, and taking the lands for the residue of the purchase money, with *John Smith* in them, as the bail of *Daniel Treichler*, for the payment of them, guaranteed by the agreement of *Henry Cassel*, as proved in this cause, no lien exists in favour of the plaintiff upon the lands so conveyed, for any part of the purchase money.

5. The Court is requested to charge the jury, who are the parties to this cause.

6. To give in charge, that *John Smith* was a purchaser, under the article of 7th of *December*, 1813, of *Daniel Treichler*.

7. To charge the jury, that under the evidence given in this cause, *Henry Cassel* is answerable to *Jacob Bower*, for the residue of the purchase money unpaid.

8. That *John Smith* and *Henry Cassel*, and the persons now claiming in their right hold the land, discharged of any lien, in favour of *Jacob Bower*, they being purchasers, under the article of 7th *December*, 1813, after an absolute deed given *Daniel Treichler*, by *Bower*, upon receiving surety for the residue of the purchase money in the obligations, the half being provisionally paid, and a guarantee of the same subsequently by *Henry Cassel*, as proved in this cause.

9. To give it in charge to the jury, that if the seller take surety in his bond for the purchase money, on executing an actual deed to the vendee, it is immaterial whether the person who enters as surety, is able to pay or not; the lien is equally gone, and the seller must look to the personal surety he has taken.

The charge of the Court was as follows.

The parties in this case are *Jacob Bower*, the plaintiff, and *John Kauffelt* the defendant, and notice has been directed by the Court, to be given to the several judgment creditors of *Daniel Treichler*, (whose land has been sold) that they may have an opportunity of shewing their several rights, to the amount of the money in dispute.—In consequence of this notice, *Jacob Bare*, *John Strickler*, *Christian Miller*, and *Abraham Shock*, have appeared by their counsel, and laid in their several claims to this money.

All these individuals have judgments against *Treichler*, and their claims must prevail, unless the plaintiff shews that he has a better right to the money than they have.

The plaintiff's claim is what is called an equitable claim, and the rule is, that where the equity of the case is equal between the plaintiff and defendant, he who has the legal right must prevail.

In this case, evidence has been given to you of an agreement between *Jacob Bower*, and *Daniel Treichler*, on the 3d day of *December*, 1813, by which *Bower* agreed to con-

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vey a certain tract of land, to *Daniel Treichler*. On the 7th day of *December*, 1813, articles of agreement were entered into between *Daniel Treichler*, and *John Smith*, the terms of which you will remember, and which I need not now repeat.

On the 12th day of *April*, 1814, *Jacob Bower* and wife conveyed all their right, and title to the property to *Daniel Treichler* in fee, in consideration of the sum of 21,600 dollars, and on the same day, *Daniel Treichler* gave five bonds executed by himself and *John Smith*, each bond for the sum of 2160 dollars, amounting altogether to the sum of 10,800 dollars. On the first of these bonds, the sum of 1659 dollars has been paid, and that is the whole amount which has been paid upon these bonds; the residue remains unpaid and unsatisfied.

It is also in evidence, that in *May*, 1814, an agreement was made between *Daniel Treichler*, *Henry Cassel*, and *John Smith*, by which *Treichler* was to have one-third, *Cassel* one-third, and *John Smith* a third. They were to hold as tenants in common, share and share alike, and were each to pay their proper proportions of the purchase money and expenses.

It appears that the property conveyed to *Daniel Treichler* was levied upon by the Sheriff under a *pluries venditioni exponas*, issued to *January* Term, 1818, at the instance of *Jacob Bare* and was sold to *George Wagan* for 5480 Dollars. The judgment on which this execution was founded, was entered the 8th day of *June*, 1815. Judgments were also entered against *Treichler*, by *John Strickler* and *Christian Miller*, on the 3d of *February*, 1816, for 2000 dollars, and by *Abraham Shock*, on the first day of *June*, 1816, for 2000 dollars with interest from the 22d of *May*, 1816.

The proceeds of the sale of *Treichler's* land, were paid into the hands of the Sheriff, and the question for you to decide is, whether they ought to be paid to *Jocob Bower*, the person who sold the land to *Treichler*, or whether in preference to *Bower*, they ought not to be paid to *Bare*, and others who obtained judgments against *Treichler*.

The law upon this subject is, that the vendor has a lien on the estate sold, for the purchase money, while the estate is in the hands of the vendee, and when there is no contract by which it may be implied that the lien was not intended to

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be reserved. *Prime facie* the purchase money is a lien, and it lies on the vendee to shew the contrary.

A judgment obtained by a third person against the vendee, does not alter or defeat the lien, nor will the indorsing a receipt upon a deed, or taking a bond for the purchase money affect it.

All deeds, and instruments of writing are to be construed, according to the intention of the parties, to be collected from the language used in them.

On a consideration of the first article of agreement, between *Bower* and *Treichler*, it does not appear to the Court that there is any thing in that, by which it may be implied, that the lien was not intended to be reserved, and if the case depended only upon that agreement, and the deed given in pursuance thereof, the law would be in favour of the vendor. Nor do we think that the signature of Mr. *Cassel*, in the manner in which it was affixed to the bonds, can make any difference, because it did not render him liable for the amount, or any part of it either as principal or surety. But there are other circumstances which must be taken into consideration.

By the article of agreement, made the 3d day of *December*, 1813, *Treichler* was to pay the sum of 300 dollars the acre, the half in hand, namely, till the first day of *April*, 1814, and the balance in five yearly payments.

There is nothing said in this agreement, as to the manner in which those payments are to be secured. Nor is there any thing further done under the agreement, between *Treichler* and *Bower* until the hand money was paid, the deed executed by *Bower* and wife to *Treichler*, and the five bonds executed by *Treichler* and *Smith* to *Bower*, for the residue of the purchase money.

It appears to us, that those bonds were thus given in pursuance of the original article of agreement. The terms of the agreement are not altered by Smith's joining with Treichler, in the execution of the bonds. The agreement says, the money shall be paid in five yearly payments, and this agreement is performed by giving bonds in conjunction with Smith, for the payment of the money. But it is contended, on behalf of the judgment creditors, that by the agreement *Treichler* was to be the sole paymaster; that instead of being satisfied with the security of his lien, by taking *Treichler* alone, *Bower*, when

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he made the deed of the 12th of *April*, 1814, by way of security, in addition to that required in the agreement took Mr. *Smith* in conjunction with *Treichler*, and that in consequence of this additional security, he lost his lien on the land for any part of the purchase money. But we are of opinion *that the security to destroy the lien, must be a distinct and independent security, and that taking an obligor in addition to the original purchaser, is not such an alteration of the security, as will of itself defeat the lien.*

If after the bonds were given, and the deeds executed, these bonds had been given up, and other bonds substituted, this would be such an alteration of the agreement between the parties as would destroy the lien, and in such a case it would be immaterial whether the person who entered as surety was able to pay or not. The lien would be equally defeated, and the seller would be obliged to look to the personal security he had taken.

We are asked to give it in charge to you, that *John Smith* was a purchaser, under the articles of the 7th *December*, 1813, of *Daniel Treichler* and that *John Smith* and *Henry Cassel*, and the persons now claiming in their right hold the land discharged of any lien in favour of *Jacob Bower*.

But we are clearly of opinion, under the evidence in this cause, that whatever lien the land was subject to, in the hands of *Treichler*, must extend to and affect them—he having the title, and they having notice of all the circumstances under which he held it.

The only question then is, did *Jacob Bower's* lien continue upon this land at the time it was sold by the Sheriff. If it did, you will find for the plaintiff, if it did not, you will find for the defendant.

The jury found a verdict for the plaintiff, and judgment was entered accordingly.

TILGHMAN, C. J. was not present at the argument, and gave no opinion.

The opinion of the Court was delivered by

GIBSON, J.—The decision of the principal question, whether an equitable lien for purchase money, can exist in *Penn-*

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sylvania, under any circumstances, will render a decision of most of, if not all the other questions raised, unnecessary. I have given this question that deliberate consideration which the great importance of its practical consequences deserves, and the result is a settled conviction, that, with us, such a lien does not exist. In *England* the doctrine is now too firmly established to be questioned, and is said to be borrowed from the civil law. But whatever be its origin, it is certain that the first trace of it in the English law is discoverable in *Chapman* v. *Tanner*, 1 *Vern.* 267, which was decided as late as 1684, three years after the date of the charter to *William Penn;* and even there, as appears in *Fawell* v. *Heelis*, *Amb.* 726, the decision was rested on a special agreement that the vendor should detain the title deeds; which therefore presented, not the case of an equitable lien, as now understood, but of an equitable mortgage. When the colony was founded, then, our ancestors could not have brought this doctrine along with them, for it was no part of the law of *England;* and no law, even of positive enactment, subsequently established there, would extend here, unless the colony were expressly named, or the law were adopted in practice. But the whole course of our jurisprudence, with the exception of certain *dicta* thrown out in two cases decided by this Court, which I shall presently examine, shews that the doctrine has never been recognised either by the Legislature or by the judiciary, or supposed to exist by the profession or the people. The Legislature has uniformly discouraged every other lien or incumbrance than those which arise from transactions which appear of record, and which therefore can prejudice no one who uses proper diligence to ascertain the state of the facts: and even where liens are permitted, it has been thought that the state of property, as well as the habits of the people, required them to be laid under severe limitations and restrictions. Thus, by act of assembly, a judgment continues a lien for but five years, unless within that period, it be revived by *scire facias;* and by the acts of 1715 and 1775, no mortgage could affect the land, unless it were recorded within six months from the date. This has, however, been altered in some respects by an act of the last session. But the whole plainly shews it was thought, the vendor had no other security than the mortgage; for it would be strange if a purchaser from the

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vendee should hold the land discharged of a mortgage given expressly to secure the purchase money, and yet hold subject to an equitable lien: and that this might happen, if the doctrine prevailed, is obvious; for the purchaser might often be affected with notice that the purchase money had not been paid to the original vendor, when he could not be affected with notice of the mortgage; and, in such case, I think it clear, according to the English doctrine, that the lien would hold; for taking a mortgage for the *whole* purchase money, would not, I apprehend, be construed a waver on the ground on which taking a mortgage for part gives rise to an inference that the vendee is to hold discharged of the residue; because by taking a mortgage for the whole, the parties expressly evince an intention that the land shall be charged with the whole. But however that might be, we cannot intend that latent incumbrances were designed to be tolerated, when we find even those which appear of record, considered in some measure as clogs on the freedom of alienation so congenial to our habits; and find them so guarded by several Acts of Assembly, as to require, under severe penalties, satisfaction to be entered wherever the money has been paid. In other cases the Legislature has taken care to provide that the lien shall continue during only a definite period: as in the case of liens on houses for materials furnished, which continue for but two years, unless an action be brought or a claim filed in the prothonotary's office of the proper county within that time; and of debts of deceased persons, which remain a lien on their lands for only seven years after their death, unless they are secured by mortgage, judgment, recognisance, or other record. So the lien of judgments in the Supreme Court is restrained to lands in the county where the judgment is rendered: and in like manner the lien of a *testatum* execution commences from the delivery of the writ to the Sheriff, who is to indorse the precise time of receiving it, and whose duty it was, before the Circuit Courts were abolished, to certify the same to the Circuit Court of the proper county. All this shews that the doctrine of lien has never been encouraged by the Legislature, but has been barely tolerated; and that too, only in particular cases and under severe restrictions.

In the practice of our Courts, we look in vain for a recognition of the doctrine, except as far as it may be thought to be discoverable in the two decisions, to which I have already

alluded. But in neither of them did the case present a single feature of equitable lien; which arises only when the *legal* title has been conveyed. Indeed on a bill by the *vendor* for a specific performance of the articles, he is said to have a lien, so as to protect him from the claims of the other specialty creditors; but this lien becomes operative only after he has conveyed: as in *Charles* v. *Andrews*, 9 *Mod.* 157. But the name of the lien denotes its nature. It is a bare *equity*, and the only interest the vendor is supposed to have retained; for while he has the *legal title*, which will prevail against all the world, before the vendee has paid the purchase money, or done whatever else may be requisite to enable him to call for a conveyance, he stands in need of nothing more. He has what is better than an equitable lien; he has the title itself. Now I can hardly believe that the case of *Stouffer* v. *Coleman*, 1 *Yeates*, 393, the first of the two in the order of time, is accurately reported; for so learned and able a Judge as Chief Justice M'KEAN after determining that the legal title had not been conveyed, would not have embarrassed himself with questions on which the cause did not turn. Lien was out of the question, as the vendor was not addressing himself to the equitable powers of the Court, for a specific execution of the contract, but had brought an ejectment on the legal title to rescind it. So if the vendee had sold to a stranger without notice, such stranger would, contrary to what the Court are made to say, have been in no better situation, than the vendee himself; for there is no plainer principle, than that the purchaser of an imperfect title, (and every equitable title is imperfect,) must abide by the case of the person from whom he buys. *Whitfield* v. *Fausset*, 1 *Ves.* 387. He is therefore bound to take notice at his peril. Neither could the detention of the title deeds add to the plaintiff's case, when the title itself was not conveyed. The reason why detention of the muniments gives an equity in *England*, where deeds are not generally registered, and where possession of the title papers is a badge of ownership, is that the want of them is notice to a purchaser from the vendee, that the latter has not cleared scores with the vendor; and therefore the title, though complete at law, is to be considered as incomplete in equity: but that circumstance surely cannot strengthen the case when the title is incomplete even *at law*. It would seem, in this case of

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Stouffer & Coleman, the plaintiff's case was considered to be a compound of legal title, equitable lien, and equitable mortgage; and that it was sustained on no distinct principle, either of law or of equity. The defendant, and not the plaintiff as said in the report, was claiming equity, and the manner in which it was accorded to him for his improvements, partly by compromise and partly by arbitration, shews the miserable shifts to which we are sometimes driven by the want of a court of chancery. The other case to which I have alluded, is *Irvine* v. *Campbell*, 6 *Binn.* 118; and there the Court undoubtedly made use of an expression favourable to the doctrine; but that was not the matter decided, for there also, the vendee purchased only an equitable title. The instrument under which the plaintiff claimed, being in the form of articles of agreement, and containing a covenant for further assurance, was of course executory. With great respect for the Judges by whom the cause was decided, I apprehend the question of notice was immaterial; for a purchaser of any thing less than the legal title, takes it, as I have already said, with all its imperfections on its head; and in all these circumstances the case differed from the ordinary case of an equitable lien, of which, being a mere equity reserved by the vendor, a purchaser of the legal title from the vendee will take the land discharged, unless he can be affected with notice. The decision on the point of the case was undoubtedly a sound one; but however much we may respect what falls from a Court in illustrating an argument, it can claim nothing like what is due to the decision of the precise point in controversy. These two cases contain every thing on the subject, that is to be found in our books of reports; and this judicial silence is a strong argument against the lien, which would necessarily have given rise to much litigation, if it had been considered to prevail among us.

Then as to the sentiments of the profession:—I have never till lately heard a doubt on the subject. In fact, the doctrine accorded with neither the professional nor the popular understanding; nor can I conceive how it ever came to be considered a principle of general equity any where, that a vendor, who has divested himself of every particle of right that can pass by deed, shall nevertheless have an available interest in the land. The implication that there is an *intention* to reserve

a lien for the purchase money, in all cases where the parties do not, by express acts, evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of every thing that can pass. The construction, therefore, which, independently of fraud or mistake, reserves an interest against the express language of the parties, is unnatural and unjust. Indeed the distinctions taken, both as to the creation of the lien, and those circumstances which are held to be a waver of it, are so purely arbitrary, that the mind is often puzzled to find the reason of them. Thus the assumption, that taking an independent security is inconsistent with an intention to retain the lien, is merely gratuitous; for the parties might in all reason, just as well be supposed to have intended the security to be cumulative. It is inconsistent with natural justice, that a vendor who publishes to the world by the terms of his deed, that he has parted with his whole interest, and has trusted to the personal security of the vendee, should become an object of special protection, against the consequences of his own negligence; and that too at the expense of a third person, who, in purchasing from the vendee, even with notice that the purchase money was unpaid, has been guilty of nothing positively immoral or even unconscionable. In practice it is never understood with us, that a lien is reserved; for it is so entirely technical that none but a lawyer would suspect that it existed. Tell any man, who does not belong to the profession, no matter how intelligent he may be in other respects, that if he conveys his house or farm without taking a judgment or mortgage, he may nevertheless come on it as a fund in the hands of a subsequent purchaser, and he will disbelieve you. In this country where every man is his own conveyancer, or, at least, where those who draw instruments, are seldom of the profession, a construction contrary to the popular notions, would, in a peculiar degree, defeat the actual intention of the parties, and so far work injustice. It is surely as important that the habits and understanding of a whole people should have an influence on the construction of their contracts as those of a particular class; and we all know the influence of the course of trade in determining the meaning of the parties to a mercantile contract.

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But if such a lien were adopted, it is impossible to see how it could be enforced, through the medium of common law forms, with convenience or justice to all or any of the parties. "It is," says STORY J., speaking of the equitable lien, "so peculiarly and *exclusively* the creature of a Court of equity, that its existence cannot safely be averred independent of the decree of such a Court." 1 *Mason. Rep.* 122. A moment's consideration will shew the justness of this remark. A Court constituted as are those of this State and of *Massachusetts*, where this kind of incumbrance does not prevail, (and probably for that very reason,) is destitute of the most essential and indispensible means of doing complete justice; such as the bill for a discovery as to knowledge of circumstances; the answer on oath; power to bring every person interested into Court as a party; and particularly that wonderfully plastic and efficient instrument the decree of a Court of chancery, which, adapting itself to the peculiar circumstances of each case however complicated, equally reaches and protects the most remote, and the most immediate interests, and at one operation does complete justice to all. With us all these are wanting, and in their stead we have power to deliver the land itself to the vendor, by an action of ejectment, or possibly to levy an execution on it in the hands of a purchaser from the vendee; but how inadequate to the end either of these would be, must, at once, be obvious. A sale on credit, for at least a part of the purchase money, is in this country the usual mode of disposing of land; and I understand that during the late rage for speculation, a plantation in *Lancaster* county, was sold six times in one day; and at each of these sales there would, according to the English doctrine, have been an equitable lien. But it would be impossible, in such a case, for a Court in this State, to settle the equities of the respective parties. Suppose a recovery by the first vendor against the last vendee: would the intervening vendors be squeezed out, or could they by paying the claim of the first, avail themselves of his rights? But the rights of the vendor are in this respect peculiar to his person, and cannot be extended to third persons, at least as far as respects marshalling real and personal estate; and they would therefore, probably have to bring actions in succession, as each should happen to obtain satisfaction. In like manner

if the estate were sold on an execution, there would have to be separate issues to try the right of each claimant to the money levied. And for what purpose involve the administration of the law in such inextricable embarrassment? Not to enforce a demand founded in natural equity, but on an artificial presumption of intention, contrary, in almost every instance, to truth, that the vendee is to be a trustee of the estate, for so much of the purchase money as is not paid. It appears to me then, that the equitable lien for purchase money, (if such a lien can with propriety be called equitable,) has never been recognised here, either by the legislative or judicial construction, the practice of the profession, or the mass of the citizens; and that as it is highly inconvenient, and by no means essential to the interests of justice, we ought not to adopt it.

There were also questions made below as to the competency of evidence, but the facts and circumstances are so imperfectly stated in the bills of exceptions, that the questions do not appear perfectly intelligible, and I therefore refrain from expressing an opinion on them: but on the first ground, I am of opinion that the judgment be reversed.

DUNCAN J.—This was an action to try the right to money arising from a sale made by the Sheriff of *York* county, of a tract of land, conveyed by *Jacob Bower* to *Daniel Treichler*, and sold as his estate. The defendant in error claimed it on the ground of lien for the unsatisfied purchase money, for which he had taken the bonds of *Treichler* and one *John Smith*; there is a receipt on the deed for the purchase money, and possession was delivered.

This case gives rise to inquiries of very extensive consequences.

1st. Does the British law of liens, for unsatisfied purchase money, where conveyance is executed, receipt given, title papers given up, possession delivered, extend to this State.

2d. Does the acceptance of a bond with security, amount to a waver of this lien.

3d. Can such latent equity prevail against a judgment creditor; and 4th. On a sale of lands by a Sheriff, deed acknowledged, money in his hands, is he bound to apply the

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proceeds to the discharge of unsatisfied purchase money, or to the payment of the judgment creditors.

It is proper *in limine* to observe, that in deciding this case, it can make no difference whether the issue is directed by the Court, or it is an adverse suit, by the vendor against the Sheriff. The sale by this application by the vendor, is validated by him. The purchaser at Sheriff's sale, is not before the Court, nor in the way in which the subject has been considered, has he any interest in the event.

The determination of any one of these questions against the defendant in error, would be decisive; but it is made the duty of this Court, to give their opinion, on every point taken in the Court below. I will, in considering these points, reverse their order, and begin with the fourth. What estate is seized and sold? The estate only which the debtor had, "the purchaser to hold only such estate as the debtor held at and before the taking in execution." Here there is a purchaser without notice, and the lien as to him, is extinct. If there were any specific lien on record created by deed or will, binding the land, it might be that the Sheriff would be bound to pay them; there is a *Nisi Prius* decision to this effect, *Nichols* v. *Postlethwaite*, 2 *Dall.* 131, but I do not go out of my way to give any opinion on that. But that where one has conveyed away his estate, given a receipt for the purchase money, delivered possession,—where a creditor relying on the estate as a fund, has afforded a credit after a long and expensive course of legal proceedings, that such creditor should be intercepted and deprived of the fruits of his execution by this latent equity, is a novel and alarming doctrine. Let us attend to the consequences. In the course of twenty years, the estate may have passed through every letter of the alphabet, the intermediate owners dispersed in every quarter of the almost boundless regions of the United States, their place of abode unknown, or if known, beyond the reach of reasonable inquiry, every hand through which it passed might claim some remnant of purchase money. What a scene of confusion would ensue, how are all their claims to be adjusted, the parties brought before the Court. Is there to be one issue or twenty four? The creditor has already sufficient difficulties to encounter, add this to them, and you destroy all credit; consider what a temptation is opened for fraud,

between the vendor and the insolvent debtor, who by connivance, might keep back the vouchers of payment and afterwards divide the spoil; the latent incumbrance kept in *petto* until the man possessing every *indicia* of property, conveyance with acquittance, and receipt of purchase money, with *muniments* of title, with possession, on the faith of this ownership, obtains a credit, and just as his creditor is about to receive his just debt, the covert incumbrance springs upon him, and swallows up all in unsatisfied purchase money. If this had been a private sale, could the vendor sue the purchaser; what would be his form of action; if he has any right in this State, his remedy must be by ejectment, the substitute for a bill in chancery, which has been from necessity applied to all cases, where one has a lien on lands, for the recovery of which there lies no action at common law, but in chancery only. Our Courts wanting chancery powers, through the medium of a jury, and conditional verdicts, and imposition of equitable terms, nearly accomplish indirectly, what Courts of equity would directly decree.

A deposit of deeds, with a written agreement to execute a mortgage; the depositor is in debt to others; he gives a judgment on which the lands are sold; money in Sheriff's hands; deed acknowledged to purchaser; can the man who holds this pledge, draw the money from the Sheriff? One would be startled at this proposition, yet he has a preferable equity, and overreaches the vendor's lien on the estate for any part of the unpaid purchase money. *Sugden*, 475. Is this lien a reprisal on an inquiry "whether the rents, issues, and profits will pay the debts within seven years."

Make the most of this lien. Say that a deed executed holds the same lien, as articles executory. If lands held by articles, are sold by the Sheriff, the purchaser takes them subject to the payment of the purchase money, out of the money raised on the sale. This is not deducted; the creditor gets the money from the Sheriff and not the vendor; his remedy is by ejectment. *Irvine et al.* v. *Campbell*, 6 *Binn.* 118. On a judicial sale under a decree in chancery, where all necessary parties joined in the conveyance, possession is delivered, money paid into bank, but not to be paid over without notice to the purchaser, the tenants were served with a writ of right, or an adverse claim before money paid out of bank, the mo-

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ney must be paid under the decree, and the purchaser cannot object to its application. *Sugden*, 415.

But the question is settled as to a purchaser at Sheriff's sale, under the act for recording deeds. He is a purchaser, though a judgment creditor is not, and is protected against an unrecorded deed. 2 *Binn.* 40. It is of some weight that though this kind of claim must have existed in hundreds of cases, this is the first time it has been advanced. This plainly shews the general sense. This action cannot be maintained against the Sheriff.

Does the equitable lien prevail against judgment creditors? By several Acts of Assembly, as well as by the common law, a judgment is a lien, binding lands. It continues a lien on real estate, without execution levied, for five years. A judgment here, in many respects, differs from a judgment in *England*, as to its binding effects, and the interest acquired by the creditor, and his power to compel payment by a sale. There is nothing here to distinguish it from a mortgage, except that the mortgage is specific, and the judgment general. In *England*, a judgment creditor is said to have neither *jus in re*, nor *ad rem*; he has a lien, but *non constat*, whether he will ever make use of it, for he may recover his debt, by *fieri facias*, from the goods of cognisor; he may take the body on a *capias satisfaciendum*, and thus discharge the lien. It is considered in that country, that the judgment creditor does not lend his money on the immediate view of the cognisor's real estate, 1 *P. W.* 280, 1 *P. W.* 492, but that does not hold here. For in *Colhoun* v. *Snider*, 6 *Binn.* 135, Judge YEATES, the strenuous and finally successful advocate of the doctrine, that judgments do not bind after purchased lands, relies much on the binding specifically all lands, held by the cognisor at the time of the entry, and that creditors do rely on the real estate always as a fund, and often as the sole fund. It is very common to take a judgment bond as a security, with stay of execution for years. This would be a miserable dependance, if the security was not equal to a mortgage, in all cases except in the one of an unrecorded deed. That depends on the different provisions of the several Acts for recording deeds and mortgages; there is a wide distinction in the effect of not recording mortgages and defeasible deeds and absolute conveyances. The Act of 1715 establishing the

office for recording deeds, declares that the first class shall not be sufficient to pass any estate of freehold or inheritance, unless recorded within six months; in the second, the recording is only for safe custody, and rendering an exemplification as good and effectual evidence, as the original deed. The Act of 1775, renders the conveyance, not recorded within six months, void only as against a subsequent purchaser, or mortgagor, leaving it in full force as to all other purposes. In *Jackson* v. *Dubois*, 4 *John*, 216, it was decided, that a mortgage not recorded has a preference over a subsequent judgment docketted; for the unrecorded mortgage before the Act, stood upon the footing of any other lien, and the Act only provided that no mortgage, unless duly recorded shall defeat or prejudice the interest of any *bona fide* purchaser or mortgagee; but it is not so here, for no estate passed under the Act of 1715; consequently the mortgage gave no lien, unless recorded within the limited time; and in the *New York* case, it was held that land sold on a judgment by Sheriff prior to the registry of the mortgage; the purchaser would hold discharged of the mortgage, and the decision in 2 *Binn*, 40, does not touch the question of unrecorded mortgages, but refers only to absolute conveyances.

We are not left to conjecture on this subject; for the Act of 23d *September*, 1783, amounts to a legislative declaration; it provides "that all mortgages executed between 1st of *June*, 1776, and 11th of *June*, 1778, which have been recorded, or shall be recorded within six months after the passing of the Act, shall be as good and effectual in law, as if they had been recorded within the limited time: with this exception, that they shall not operate against any judgment or lien whatever." The whole policy of our laws evinces the intention of the Legislature, that the notice by registry should be given of all liens; but by a late Act, mortgages only take effect from the registry, except in the case of a mortgage given for the purchase money of land, and the time allowed for registering is abridged: it would be absurd, that the security by mortgage should become extinct, if not recorded within six months, and yet the bond should continue the lien for an indefinite time. My opinion is, that a lien by judgment is a legal incumbrance, to be preferred to an implied lien for purchase money.

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Does the taking of bond with security wave the implied lien? It has justly been observed, that the taking of a bond with security, has become so perplexed a question, as to require a chancery suit to ascertain whether it is waved or not. In *New York*, in *Garson* v. *Green & al.*, 1 *John, Ch. C.* 308, it was held, that taking a negociable instrument from vendee, did not exempt from the lien. In *Virginia*, while they seem to adopt the English rule of lien, yet the Courts have settled the question. Where a bond with security has been taken, the lien is thereby waved. *Cole* v. *Scott*, 2 *Wash*, 141, *Wilson* v. *Graham's executors and devisees*, 5 *Munf*, 297. All the cases, and there are many with shades of difference scarcely perceptible, and impossible to be reconciled, are fully considered by Mr. Justice STORY in *Gilman* v. *Brown*, 1 *Mason*, 212, who decides that where there is the security of a third person taken as such, this extinguished the implied lien; and on appeal, the Supreme Court determined that a collateral security for the purchase money, discharged the implied lien, 4 *Wheat.* 256.

The lien is founded on a presumed intention. Here there was evidence of a contrary intention, from the nature of the speculation. *Bower* well knew that *Treichler* bought with a view to lay out a town on the land, to divide it and sell in small lots; he knew before he executed the conveyance, that others were concerned in the purchase, yet the deed is made to him alone, and when he insisted on *Cassel* being added as a security, while he made the deed to *Treichler* alone, the ostensible man, to whom the title was to be trusted, and accepted the bond of *Treichler* and *Smith*, this arrangement shews that the land was not to be charged; it is manifest, lien was not in the view of any party. When we turn our eye to that day of infatuation, consider the extravagant price, the rage for laying out towns, the declared design of the purchaser, which was not to keep the land, but to sell—to sell quickly, before the bubble burst; to sell certainly long before the last instalment became due, it is obvious, that it was not the intention of the parties, to clog it with an incumbrance, which would defeat the whole scheme. In *Brown* v. *Gilman*, STORY J. observes, it was in the contemplation of the parties, bought on speculation, to be sold out to sub purchasers; the great object of speculation would be embarrassed by any latent incumbrance,

which by a subdivision of the property, might be apportioned among an almost infinite number of purchasers. It was not supposeable that so obvious a consideration was not within the views of the parties, and viewing it, it was difficult to believe, they should mean to create a lien. The same course was adopted on the appeal; taking the security of a third person, it was decided, repelled the lien, standing on that fact alone. Considering all the circumstances of the case, the large payment in hand, the grand object of the purchase, the taking *Smith* in the bond, the subsequent addition of *Cassel's* name, the anxiety of *Bower* to procure that name, that *Treichler* was not able to make up his half of the hand money, and *Bower* took his own bond for that balance; the presumed intention to retain a lien, is removed; the lien is not in its nature conclusive, but *prima facie* evidence of an intention, which vanishes, when the real state of the facts is disclosed.

The Court, in their charge, have gone the full extent of the British decisions, and have considered that as settled, which even there remains most obscure and unsettled. They state in terms, that taking an obligor in addition to the purchaser, was not such an alteration as would of itself defeat the lien. There was error in this; for *ipso facto* the taking a bond with security waved the implied lien.

I have reserved for the last enquiry, the primary question to the decision of which, many are looking with anxiety, and deep interest; for on its decision, rest numerous claims, to a vast amount, as we are informed, and as I well know to be the case.

Does the rule of implied lien extend to this State? If it had been adopted by a settled course of decisions, and the public had acted upon it, and placed reliance on it as a security; and men when they bought had been apprised of its existence, and those who credited them on the strength of their title, had been put on their guard; it would, by the course of dealing and general adoption, become a settled rule of property, and whatever opinion I might entertain of its inconveniences, I would not disturb it, or unsettle it. But far different is it; for the doctrine is here a novel one lately broached in this State, and I may add lately imported, and directly against the understanding of the country, and the opinion of professional men, and in direct opposition to the policy of our government, which is to leave this species

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of property, altogether free to alienation, unincumbered with secret trusts, or concealed liens. What is the rule contended for? It is, that where an absolute conveyance, with receipt for the purchase money is given, and possession delivered, where the purchase money is not paid, but bonds given for payment, the vendor has a lien in equity for the purchase money, against the vendee and his heirs, and against all claiming under them with notice, that it remains unpaid, though there is no agreement for that purpose.

The first notice we have of this supposed lien, is in *Stouffer* v. *Coleman*, 1 *Yeates*, 393. It is a *Nisi Prius* decision, and but of one Judge, yet it was acquiesced in, and was the opinion of a very eminent Judge, the late Ch. J. M'KEAN. There a writing had been executed, conveying by words of actual grant, but it was called an article of agreement, and looked to a future conveyance of the land, for there was a covenant to convey at a distant day, by a good and sufficient conveyance. The Ch. Justice considered the case as turning on a short question. "Did *Stouffer* sell and convey, or only agree to sell and convey." But even considering it an agreement, a difficulty still rested with him, whether the bond taken for the purchase money, did not destroy the lien. To obviate this, he had recourse to the circumstance, that no receipt was indorsed for the purchase money, and *Stouffer* kept possession of the title papers. No doubt the lien existed, because the legal title remained in *Stouffer*; but had it been a conveyance executed, no question at that day would have been raised,—no doubt entertained but the lien was gone. It was construed an agreement executory, where the vendor retained the legal title, and consequently held the lien. *Fawell* v. *Heelis*, *Ambl.* 724, *December*, 1773, the latest decision before the revolution was recognised as the law of the State. One sells an estate and takes bond for the purchase money, the vendor has no lien against the creditors, for whose benefit the estate had been assigned. Lord APSLEY, in concluding his opinion, says, *if the vendor parts with his estate, and takes a security for the consideration money, that is no reason for a Court of equity to assist him against the creditors of the purchaser.* This was the principle of the *British* Court of Chancery at the time of the revolution. New principles may have since been adopted there, but here they have not been recognised,

nor are they applicable to the state of property, or condition of this country. *Irvine et al. v. Campbell*, 6 *Binn.* 118. This case has been misunderstood. There as in *Stouffer's Case*, the instrument was denominated an article of agreement, and contained a covenant, that each party would give to the other, any further instrument of writing agreeable to law, which should be *necessary for the security of either.* So far from that being an acknowledgment of payment of the purchase money, it appeared on the face of the agreement that it was not due, until after the judgment and sale to *Irvine.* The vendee if required, was to give security for it. It was then very properly held, that a vendor had a lien for his purchase money; the lien was apparent on the very instrument, and there was a covenant for payment, running with the land. It was a stronger case of lien than *Stouffer's*; there was no bond; other security was contemplated, and it is to be observed in that case, that recourse was not had to the Sheriff, for the proceeds of sale, but to the land by ejectment. And in *Colhoun* v. *Snyder*, 6 *Binn.* 167, YEATES J. states, that if the rule should be adopted here, that judgments bound after purchased lands, the situation of a buyer and seller would be most perilous. The seller would not be secure by taking a mortgage or judgment. The estate must necessarily be in the buyer, before he could give a mortgage or judgment, which might become a lien on the property; for *eo instanti* the conveyance is delivered, the old judgment attaches. The idea of lien had not entered into the mind of that learned Judge, who spoke from an experience of more than fifty years, on a subject with which he had been particularly conversant; and from the general sense of the community, and as the point is new with us, there is good reason and sound policy in adhering to the common understanding, that the security of the party himself should extinguish the lien on lands, as it does on personal chattels. 4 *Wheat*, 296. That the rule itself is not one of general, but peculiar equity, we have the high authority of the Ch. Justice of the United States; for he cautiously avoided giving an opinion, whether it extended to the State of *Georgia* "We do not mean to decide that question," was his observation.

Our local circumstances in considering questions of this kind are always to be respected. They differ materially from

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old settled countries, whose lands being improved for ages, the price is not so subject to great fluctuation; it is different here, where lands are treated as a species of merchandise, *Colhoun* v. *Snyder*, 6 *Binn.* 146.

The rule of law is *caveat emptor*, but let the seller take care; it is easy for him to take a mortgage, if he means to hold the land as security; and this is so well understood that the instances are few, where this is intended, that a mortgage is not taken; and where this is not done, *prima facie* the vendor waves all lien, relies on the obligation of the vendee, sometimes alone, at others with the addition of some person, as his security. Where he parts with the title, he takes all risk of payment on himself.

In this State the obligation of *Bower* was not what in the French law is called a privileged obligation, for which he had a lien, on the property sold, to be paid in preference to other creditors, but a common unprivileged obligation; without lien, agreement, or covenant binding the land, running with it; the personal security of the obligor. Such likewise is the settled principle in *South Carolina*, *ex parte Wragg*, 2 *Desaus*, *Ch. Rep.* 509. It was there decided that a vendor selling lands, and conveying them in fee and taking a bond for the purchase money has no implied lien on the land, so as to give him any preference over the creditors of the purchaser.

This implied lien would impede the transfer of lands, and the settlement of the country; raise up a new and fruitful stock of litigation, whose branches would cover the land, and entangle the people in endless controversies. Besides without vesting other chancery powers, than our Courts can legally assume, it would be impossible to accommodate the common law jurisdiction and form to the varieties of disputes, which this contentious doctrine would introduce. Indeed many of our positive laws must be repealed to meet it, the whole economy of our laws changed, as regards the payment of the debts of persons deceased, and the division of the estate of insolvent debtors among the creditors. For a bond for payment of purchase money would come in for payment, out of the land purchased, and held by the deceased, before the many other kinds of debts that precede it under our laws, and such bond might exhaust the most valuable parts of the estate of an insolvent debtor, and leave little for his other creditors. There is

no natural equity in favour of the lien, it does not exist at law, it is not created by usage of the parties or express agreement.

But I except all cases of deceit and distinct fraud, where one having direct notice, that the purchase money has not been paid, for the purpose of defrauding the vendor, obtains a judgment mortgage or conveyance. I would hold all this fraudulent and void, and that vendor might proceed to judgment, and sale of the land; for this transaction, though valid between the parties, as to others, by reason of covin, collusion, or confederacy would be fraudulent and void. As if a man knowing that a creditor has obtained a judgment, buys the debtor's goods for a full price to enable him to defeat the creditors, it is fraudulent and void, *Worseley* v. *De Mattos*, 1 *Bur.* 474. So if a man knowing that an executor is wasting the goods of the testator, and turning them into money, the more easily to run away with it, buys from the executors with that view though for a full price, it is fraudulent and void, *Mead* v. *Lord Orrery*, 3 *Atk* .235. For nothing can be better established, than that the laws will set aside, however valuable the consideration may be, every contract which is fraudulently designed to prejudice, and does prejudice others; but the knowledge by a purchaser that there was a balance of purchase money remaining due when the vendor had conveyed the legal title, and taken bond for the purchase money, is not of itself such notice as will taint the purchase with fraud, and render the land liable for the purchase money.

On the exceptions to the evidence, as there was no lien, and as no action could be supported against the Sheriff, it follows that all was irrelevant and inadmissible. For these reasons I am of opinion that the judgment be reversed.

Judgment reversed.

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RAMBLER and another *against* TRYON and others.

June.

IN ERROR.

On the trial of the validity of a will impeached on the ground of imbecility of the testator from childhood to death, the opinion of other witnesses than those who attested the will who knew him during that time without stating any facts is not admissible, but when they state facts as the ground of the opinion it is good evidence.

In such case the declarations of the supposed testator made in the absence of his wife, the devisee, of importunity used by his wife and his father-in-law to procure the will to be made, are evidence.

A deposition not taken according to rules established by the Court is not evidence.

ERROR to the Court of Common Pleas of *Lancaster* county.

Eve Tryon and others, the plaintiffs below, heirs at law of *Michael Rambler*, deceased, brought this ejectment for real estate in *Lebanon* county, against the defendant, *Eve Rambler*, who was the widow of the said *Michael Rambler*, and *H. Spayd*, who held under her. The right of the defendants below depended on the validity of a paper, purporting to be the last will and testament of *Michael Rambler*, the owner of the estate, by which he bequeathed it to the said *Eve Rambler*. If this was not the last will and testament of *Michael Rambler*, the plaintiffs below were entitled to a verdict, as heirs at law. The execution of the will was duly proved by the subscribing witnesses, who likewise attested on the trial the capacity of the testator, and that he was of sound and disposing mind and memory. The will was impeached on the ground of imbecillity of mind of the supposed testator, from his childhood to the hour of his death, and witnesses who had known *Michael Rambler* intimately from his childhood to his death, were offered to prove certain facts tending to shew an extraordinary dulness of understanding, followed up by the opinions of the witnesses founded on these facts, that he was incapable from defect of understanding to make a will. All this evidence was objected to by the defendants below, but the Court admitted the evidence and sealed a bill of exceptions.

The plaintiffs also offered a witness to prove, that *Michael*

Where witnesses on the trial of the validity of a will have given their opinion of the understanding of the testator founded on facts known to them, they cannot in the cross examination be asked what their opinion would be on a different state of facts.

After a plaintiff has obtained judgment in ejectment for a moiety of the land, he may sustain a new ejectment for the whole against the same parties without taking possession, or suing out a writ of possession or using any means to inforce the former judgment. But if a party after recovering in ejectment harrass the defendant by a new ejectment, when he is willing to surrender, such defendant might obtain relief on motion.

Rambler, in the absence of *Eve Rambler*, told the witness that his father-in-law and wife plagued him to go to *Lebanon*: that they wanted him to give her all, or he would have no rest, and that he did not wish to go to *Lebanon*. This evidence was objected to by the defendants, admitted by the Court, and an exception taken.

John Gloninger Esq. who drew the will, and the Rev. *John Lochman*, having been examined on behalf of the defendants, testified to the knowledge and capacity of the testator; the plaintiffs then proposed to ask them the following questions, alleged to be founded on their examination in chief, and all the testimony given in the cause.

1st. If you had the knowledge of the fact, that *Michael Rambler*, the supposed testator had, in his youth, after ten years of age, gone to school for a number of successive winters, to a good and attentive school master, and could not learn his A. B. C. or spell more than and, would you have thought him capable of making a will?

2d. If you knew that *Michael Rambler*, the supposed testator, neither knew the value of money, nor of property, would you think him capable of making a will.

3d. If you knew when *Michael Rambler* bought two bushels of turnips, and was told they were a quarter of a dollar a bushel, and he then gave in pay one dollar and fifty cents, and asked if it were enough, would you think him capable of making a will.

4th. If you knew that he and his wife agreed to buy a couple of sides of leather, and when he called to pay for them, he was told the price was 18*s*. 3*d*. or 18*s*. 9*d*. and he gave in pay either seven or nine dollars, and insisted it was not enough, and he would bring the remainder in a few days, would you have thought him capable of making a will. To all which questions the defendants objected; and the Court overruled the objection, and permitted the questions to be asked the witnesses. To which opinion of the Court, the defendants excepted.

The defendants to rebut the plaintiffs', testimony offered in evidence, the deposition of *John Snee*, taken on the 24th *July*,

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1819, under a rule of Court and notice, and filed on the 1st day of *April* Term, 1820, (the term at which the cause was tried) by the defendants, counsel: they having had it in their possession at the *January* Term preceeding. The plaintiffs objected to this deposition and the Court rejected it. To this rejection an exception was also taken.

The Court charged the jury, that after the plaintiff has obtained a judgment in ejectment, he can sustain a new ejectment against the same parties for the same land, without taking possession, or suing out a writ of possession, or using any means whatever to enforce the first judgment.

The opinion of the Court was delivered by

DUNCAN J.—The right of the plaintiffs depended on the validity of a paper, purporting to be the last will and testament of one *Michael Rambler*, the owner of the land, for which this ejectment was brought. If this was not his last will and testament, the defendants in error, and plaintiffs below, were entitled to a verdict. The execution of the will was duly proved by the subscribing witnesses, who likewise attested the capacity of the testator, and that he was of sound and disposing mind and memory.

The will was impeached on the ground of imbecility of mind of the supposed testator from his childhood to the hour of his death; and witnesses were offered to prove certain facts, tending to shew an extraordinary dulness of understanding, followed up by the opinion of the witnesses, as founded on the facts, who had known *Rambler* intimately from his childhood to his death, that he was incapable from defect of understanding to make a will. All this evidence was objected to, and the objection overruled, and evidence admitted. I am at a loss to perceive any plausible reason to support this objection. I know not how otherwise the alleged imbecility of mind could be proved, than by the evidence of those who grew up with him, who marked his conduct in infancy, in the prime of life, and in his decline. The opinion of the witnesses, without stating the grounds of such opinion ought not to be received. But when they state facts, indicative of want of common intellect, their opinion is always received. The weight it ought to have, will depend

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on the solidity of the reasons assigned for the opinion, and the intelligence of the witness.

This is not a case of alleged lunacy It is in the nature of ideocy. Not an obscuration of the mind at particular seasons, but a continued darkness of the understanding from birth until death, a perpetual infirmity from infancy, rendering him incapable of managing himself and his affairs. This is the allegation. I say nothing, nor is it my duty to give an opinion, whether the proof when admitted, made out, or did not make out the case of those claiming as heirs. To confine it to subscribing witnesses to the will in such case as this, would be absurd. It is not alleged that during a partial privation of understanding, he signed the will, but that he never was at any time of his life capable of making his will, and in that case I can see no good reason for excluding all but the subscribing witnesses to the will. The friends who visit him, the physician who attends him, have equal if not superior means of information, to him who may be called on, (after the will is declared in his presence,) to attest the publication. The will of every man would depend too much on the subscribing witnesses, if no other were deemed competent to testify to the sanity of the testator. The most spurious instrument would be imposed on the heir, or the devisee might be deprived of the estate devised, by a conspiracy of the subscribing witnesses. Such conspiracy is not without a precedent in law. *Lowe* v. *Jolliffe*, 1 *W. Bl.* 365. Five subscribing witnesses to a will and a codicil, and a dozen of servants of the testator, unanimously swore him to be incapable of making a will. To encounter this evidence several of his friends who had frequently conversed with him during a period of four years, deposed to his entire sanity and more than ordinary intellectual vigor. The will was established, and the testamentary witnesses convicted of perjury. This evidence was properly received.

The declaration of the testator, that his wife and father-in-law plagued him to go to *Lebanon*, that they wanted him to give her all, or he would have no rest, that he did not want to go to *Lebanon;* this would be evidence of weakness of mind, operated upon by excessive and undue importunity. It forms no objection to it, that these murmurs of a weak mind were made in the absence of the devisee. We should be

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surprised to hear that they were made in the presence of that devisee, an importunate and teasing wife. There often will be influence used in procuring a will, but this can be no reason to set it aside; but undue importunity, plaguing a weak man, giving him no rest, until he would give all, are circumstances to be considered by a jury, in connection with proof of imbecillity of understanding, denoting a man so void of reason, as that he is incapable of managing or disposing of his estate.

As to the rejection of the deposition of *John Snee*, the Court had established certain rules for filing depositions; these had not been complied with, and the deposition was properly rejected.

In the cross examination of the Rev. Dr. *Lochman* and Judge *Gloninger*, who drew the will, and who were examined in chief by the plaintiffs in error, who spoke of the knowledge of *Michael Rambler*, and testified to his capacity; a string of very extraordinary questions were put to them, which were objected to, the objection overruled, and exception taken. These witnesses had given an opinion of the capacity of this man, founded on facts known to them, and conduct within their own observation. And they are called on to say what their opinion would be in a different state of affairs.

These questions were ensnaring, and to which the witnesses themselves might justly have excepted; they drew their opinions from their own knowledge and observation, not from the knowledge and observation of others. They gave the opinion and the reasons for the opinion on oath. They were not bound to give an opinion, on an assumed statement of facts, or facts sworn to by other witnesses; but this evidence the plaintiffs in error were right in objecting to, although the witnesses might be willing to answer the questions. Opinion is no evidence, without assigning the reason of such opinion; now the witnesses had already given the opinion, and the facts on which they founded it; the jury were to judge of the correctness of that opinion from the facts and reasons stated by the witnesses. But the witnesses' opinion of the capacity of a man must not be founded on the hearsay of others, or the oath of others. As well might the defendants in error called for the opinion of any bye-stander, who had heard the evidence given by them of the state of

the man's mind, and asked him what he thought of the capacity of *Michael Rambler*. With the same propriety, they might have called in every man in *Lebanon*, and enquired of him, what think you of *Michael Rambler's* capacity to make a will, after the proof we have here given. So the devisees might have enquired of every man they could see in Court, we have proved certain facts, do you not think our testator had sense enough to make a will? To give such latitude as was allowed in this case, to a cross examination, would be trying a cause, not by the evidence of facts, and opinions formed by the witnesses, from their own observation and knowledge, but would be trying it on opinions founded on hypothesis and facts stated by others, unknown to the witnesses, and altogether inconsistent with their knowledge, and with the knowledge to which they had testified. Ask the opinion of a witness, as was here done—if you knew *Michael Rambler* neither knew the value of money or property, would you think that he was capable of making a will? The answer would be, I think not. Ask him again if you knew *Michael Rambler* had sense enough, and was selected to be an elder in the church, and had as much sense as half the farmers in the country, would you think him capable of making a will? The answer would be, I think he would. Does such question and answer deserve the name of evidence? Does it demonstrate the matter in issue—the capacity of *Michael Rambler?* I think it does not; it might perplex—but never would enlighten the jury.

I am therefore of opinion there was error in this. It requires not the understanding of a *Locke* or a *Newton*, to make a will; there is no standard by which the understanding is to be weighed, but one—and that is—Has the party such a portion of understanding as would enable him to do any binding act?

The last exception is to the charge of the Court; the Court decided, that after the plaintiff has obtained a judgment in ejectment, he can sustain a new ejectment against the same parties for the same land without having gone into possession, or suing out a writ of possession, or using any means whatever to enforce the first judgment.

If the action of ejectment, were for the recovery of damages for the entry and continuance of possession, it would seem to me that this decision would be erroneous, and that

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the party might avail himself of it, at a proper stage of the cause. For a recovery in trespass without execution is a bar; but the damages are in ejectment nominal, and I do not know that in an action for mesne profits, there could be a recovery beyond the time of judgment. If it was trespass, the former recovery must havebeen pleaded; but in ejectment on the general issue, perhaps every thing might be given in evidence to bar the plaintiff's recovery. This would present a difficulty, and where the first recovery was for the whole land for which the second ejectment was brought, the defendant who was willing to surrender the land, might be unnecessarily exposed to the costs of a new ejectment. In such case I think the Court could grant relief in a summary manner on motion, for they possess the power to alter the practice and institute any new rule in the action of ejectment, which they may deem beneficial ,not inconsistent with legislative provisions. 4 *Dall.* 144. Courts have exercised a similar power; for when an ejectment had been brought and was depending in the Court of Common Pleas, and another brought in the King's Bench, the latter was staid, till the former was discontinued and decided, *Andr.* 297, and if a party would harass a defendant by double ejectment, the defendant would be relieved on motion. When such a case occurs, the Court would exercise their own discretion, in granting relief on motion, but it does not occur here; for here the plaintiffs only recovered a moiety, and if the defendants did not intend to contest his right to the moiety, they might have so entered their defence; for by the Act of 21st of *March*, 1806, regulating proceedings in ejectment, it is provided that the defendant shall enter his defence for the whole or any part, and thereupon issue shall be joined. They have taken defence for the whole, issue was joined on the whole, and they come too late on the trial of this issue, to say we admit your right to the possession of the part recovered. This from the nature of the claim they never intended to do. They claimed the whole under the will, and the issue in substance was on the validity of the will. There was therefore no error in the charge, in this respect.

Judgment reversed.

END OF LANCSTER DISTRICT, MAY TERM, 1821.

AUG 18 18

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA

MIDDLE DISTRICT, JUNE TERM, 1821.

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KENNEDY *against* BOGERT and others.

IN ERROR.

Friday, June, 14.

ERROR to the Court of Common Pleas of *Columbia* county.

The defendant in ejectment, cannot give in evidence, a record of a suit against a third person on which the land was sold to one under whom he claims, unless some colour of title be first shewn in the person as whose property the land was sold.

Ejectment by *John Kennedy*, against *Godfrey Bogert*, *John Faust*, senior, and *John Faust*, junior. The plaintiff claimed under a patent granted the 8th *August*, 1781, to *Elias Boudinot*, who conveyed to *Daniel Montgomery*, who conveyed to *John Linn*, who conveyed to the plaintiff. After the plaintiff had gone through his evidence, the defendants alleged, that they claimed the land under a sale of it by the Sheriff, as the property of *John Fenner*, and proceeded to offer in evidence a paper purporting to be a copy of a record of the Court of Common Pleas of *Northampton* county, in a suit in which *James Taylor*, and others, administrators of *James Taylor*, were plaintiffs, and *John Fenner* defendant, brought to *August* Term, 1802. The plaintiff objected to this evidence, but the Court admitted it, and the plaintiff tendered a bill of exceptions. The jury found a verdict for the defen-

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dants. There was an exception also taken to the charge of the Court, which was afterwards relinquished.

Bellas, for the plaintiff in error, now contended, that the record ought not to have been admitted in evidence. It was between different parties, and some title should have been previously shewn in *Fenner*. A deed cannot be given in evidence till some title be shewn in the grantor. 1 *Binn.* 190. 2 *Serg & Rawle*, 80. A purchaser at Sheriffs' sale, stands on the same footing as other purchasers. *Little* v. *Delancy*, 5 *Binn.* 266.

Greenough, contra.

The defendants had a right to shew that they came into possession lawfully, before the plaintiff purchased: they intended to follow it up by proof, that *Linn* and the plaintiff, knew of the purchase and did not forbid it.

The opinion of the Court was delivered by

GIBSON J.—The record of the judgment in the Common Pleas of *Northampton* county, was not evidence, without some colour of title being first shown in *Fenner*, as whose property the land was sold. If a party may in every case begin at either end of the chain of his evidence, why might not the defendant have insisted on shewing the Sheriff's deed in the first instance, without producing even the judgment? He could not do so, because without the process and authority of the law, the Sheriff who has no pretence of property in himself, but is merely the instrument of the law in vesting the property of another, can pass nothing by his deed, and the Court are not compelled to go through the idle ceremony of receiving evidence which, by the very shewing of him who offers it, is irrelevant and inoperative. If instead of the compulsory conveyance of the law, the defendant had offered a deed directly from *Fenner* himself, it would have been impertinent until it were shewn the grantor had some right to convey. There may be cases where the Court, for the sake of convenience, will exercise a discretionary power in the admission of particular parts of the evidence out of their proper order, provided there is at the same time an offer to supply whatever may be necessarily introductory; but that is only

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a relaxation of the rule for the sake of convenience and expedition, which the Court is not bound to admit in practice, and to warrant which, requires the special circumstances to be shewn on the bill of exceptions; otherwise it will be error. Here no circumstances appear to justify a departure from the rule, and as the evidence, for any thing that is shewn, was entirely irrelevant, it was error to admit it. The exceptions to the charge intimated in the opening, have on the suggestion of the Court, not been insisted on in the reply; and indeed it would be impossible to sustain them: but the exception to the evidence is well founded, and the judgment must be reversed.

Judgment reversed.

FISHER and another *against* LARICK and others.

IN ERROR.

Monday June 18.

In ejectment, a description of the land claimed, as two houses, one barn, 80 acres of arable land, 20 acres of woodland, with the appurtenances, in Penn's township, Northumberland county, being part of a tract of land surveyed in pursuance of a warrant granted to W. G., is sufficient after verdict.

ERROR to the Court of Common Pleas of *Union* county, in an ejectment brought by *John Larick*, *Kilian Foust*, and *Catherine* his wife, late *Catherine Larick*, against *Peter Fisher* and *Solomon Werlein*. Several errors were now assigned in relation to the description filed in the cause, the verdict, and the charge of the Court.

The description was as follows. "Two houses, one barn, eighty acres of arable land, twenty acres of woodland, with the appurtenances in *Penn's* township, *Northumberland* county, being part of a tract of land surveyed, in pursuance of a warrant granted to *William Gill.*"

The jury in their verdict "found for the plaintiffs, with six cents damages, and six cents costs.

The judge in charging the jury is not bound to deliver his opinion on matters of law, further than is required of him.

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The Court in its charge to the jury, stated that "at the time of the Sheriff's sale, *Larick* lived upon this land, and it was sold as two hundred acres, more or less, unimproved land. From this circumstance, the counsel for the plaintiffs have contended that the purchaser at Sheriff's sale had notice of the plaintiff's claim. Whether the purchaser at Sheriff's sale, had notice or not, is a fact for the determination of the jury; but what would be considered a legal notice will be described to the jury in the answers which the Court shall give to certain points stated by the counsel for the defendants." One of these points was, that *Peter Fisher* is to be considered and protected as a purchaser for a valuable consideration, without notice of the plaintiff's claim. The answer of the Court on this point was, he is to be considered so, and protected, unless those under whom he claims, and himself also, can be affected with notice, actual or constructive, before his purchase.

Hall and *Fisher*, for the plaintiffs in error.

1. The description is essentially defective in not mentioning boundaries. The Legislature has directed in the Act of 21st *March*, 1806, *Purd. Dig.* 145, a form of writ, which it declares shall be, as prescribed, and not otherwise. Here the original writ is not to be found. The description is all that can be referred to, and it is not according to the Act, nor is it certain enough to enable the Sheriff to deliver possession. The act directs, that where a remedy is prescribed by Act of Assembly, no other remedy shall be had.

2. The verdict is general, without ascertaining the land of which the Sheriff is to deliver possession, and is liable to the same objection of uncertainty. In no case has it been held that such a verdict was good, or could cure the defect of the description. In *Hahn* v. *Norris*, 4 *Binn.* 77, the writ describing the tract as bounded by land of *John Hahn*, was held sufficient, because it was according to the formule prescribed in the Act of Assembly. So in *Cahill* v. *Bell*, 6 *Binn.* 99, the description in the præcipe, was held to render unnecessary the filing of any other description. So in *Benjamin* v. *Armstrong*, 2 *Serg. & Rawle*, 292, it was held no error, that the writ was not signed by the prothonotary, if it was under seal of Court.

3. The Court should have given an opinion on the question of legal or constructive notice, as they stated they would. This question was material to the cause. 1821. *Sunbury.*

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Greenough, contra, referred to the opinion of the Court given in this cause at *Sunbury*, at *June* Term, 1818, 3 *Serg. & Rawle*, 319 and to the objections made to the proceedings and answered.

1. Imperfections in the writ are cured by verdict. It has therefore been held that want of the prothonatory's signature is cured by verdict.

2. As to the verdict itself, it is enough if it pursues the writ.

3. The only complaint as to the charge, is that the Court did not instruct the jury what was a constructive notice. But they were not requested to charge particularly on that point.

The opinion of the Court was deliverd by

TILGHMAN, C. J.—The principal error assigned in this case is, that the writ of ejectment did not pursue the form prescribed by the Act of Assembly. But this, being merely matter of form, will be cured by the verdict, provided the description of the land is sufficiently certain to support the judgment. This was decided in the case of *Lion* v. *Wilt*, where the *township* in which the land lay, was omitted in the writ, and yet this Court supported the judgment. The description in the present case was as follows. Two houses, one barn, eighty acres of arable land, twenty acres of woodland, with the appurtenances, in *Penn's* township, *Northumberland* county, being part of a tract of land surveyed in pursuance of a warrant granted to *William Gill*. This surely is quite certain enough, indeed much more certain than descriptions usually were, before the Act of Assembly. There will be no difficulty in delivering possession, on a *habere facias possessionem*, considering the superintending power of the Court, which will always be promptly exercised, in case the plaintiff takes what he has not recovered, and this power must sometimes be resorted to, even supposing the writ to be exactly conformable to the Act of Assembly. For it is impossible to describe a tract of land with so much certainty, as to ena-

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ble the Sheriff to deliver it, without some person to shew him, on the ground, the boundaries alluded to in the writ. The defendant may indeed insist on the form of writ prescribed by law; but then, he must do it, in an early stage of the proceedings. The objection comes too late after verdict.

It was also assigned for error, that the President of the Court of Common Pleas, did not, in his charge to the jury, instruct them as to the nature of *constructive notice*. I do not think there is any weight in this objection. The President told the jury, in his charge, that he should give them his opinion, as to constructive notice, in his answer to certain questions proposed by the counsel for the defendants, and he did give an answer to a particular point proposed by the defendants' counsel, on that subject—if more had been desired, more should have been asked; but surely it was enough for the Judge to answer what was asked.

It is the opinion of the Court, that the judgment should be affirmed.

Judgment affirmed.

CHESNUT and another *against* SCUDDER and others.

Monday, June 18.

IN ERROR.

Land on which no settlement had been made might have been taken up under one of the warrants known by the name of David Meade's warrants issued the 5th April, 1802.

ERROR to the Court of Common Pleas of *Northumberland* county, in an ejectment brought by *Daniel Scudder* and others, against *John Chesnut* and *Philip Hensel*, in which there was a verdict in the Court below in favour of the defendants. The case depended upon a single question, whether land on which no settlement had been made, could be taken up by virtue of one of the warrants known by the name of *David Meade's* warrants, issued the 5th of *April*, 1802. The Court of Common Pleas decided in the affirmative, and their opinion was excepted to by the plaintiffs in error, who were also plaintiffs below.

Burnside and *Marr*, for the plaintiffs in error, referred to the

Act of Assembly of *September*, 24th 1794, 3 *Sm. L.* 193. *March*, 9th 1796, 3 *Sm. L.* 267. *Ward* v. *Armstrong*, 3 *Serg. & Rawle*, 305. Act of Assembly of *April*, 3d 1792, 3 *Sm. L.* 75, and 19th *February*, 1801, 3 *Sm. L.* 461.

Greenough, for the defendants in error, referred to the Acts of Assembly of *March* 28th 1787, 2 *Sm. L.* 242. *April* 1st 1784, *Purd. Dig.* 383. *March* 29th 1792, 3 *Sm. L.* 63. *March* 6th 1793, *Purd. Dig.* 386. *April* 22d 1794, 3 *Sm. L.* 184. *Commonwealth* v. *Cochran*, 2 *Binn.* 270. *Wilkins's lessee* v. *Allerton*, 2 *Sm. L.* 246. Act of *April* 1st 1805, 2 *Sm. L.* 248.

In reply, the case of *Moodie's lessee* v. *Haymaker*, 2 *Sm. L.* 243, was cited.

The opinion of the Court was delivered by

TILGHMAN, C. J.—This case depends upon a single question, whether land on which no settlement had been made, could be taken up by virtue of one of the warrants known by the name of *David Meade's warrants*, issued the 5th *April*, 1802. The Court of Common Pleas decided in the affirmative, and their opinion was excepted to by the plaintiffs in error, who were also plaintiffs below.

David Meade's warrants were of a peculiar nature. He had taken up land near *Wyoming* under *Pennsylvania*, the possession of which was taken from him by certain persons claiming title under the State of *Connecticut*. The memorable contest between *Pennsylvania* and *Connecticut*, is so well known, that it may now be considered as matter of history. In order to quiet those disturbances, which had agitated both States, and more than once been attended with bloodshed, an Act of Assembly (called *the confirming act*) was passed on the 28th *March*, 1787, by which the titles of certain *Connecticut* settlers was confirmed, and provision was made, for compensating the *Pennsylvanians*, who thus lost their lands, by a grant of other lands *wherever they could be found vacant, within the State*. But the agitations of party, having not yet subsided, the confirming law was *suspended* by another Act (called *the suspending Act*) passed, the 29 *March*, 1788, and finally *repealed*, by an Act passed the 1st *April*, 1790. The

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Pennsylvania claimants were thus left in a distressed situation. The possession of their lands was withheld, and yet they could obtain no compensation. It is true, the Courts of justice were open to them, and after the decision by the Circuit Court of the United States, (in the case of *Vanhorne's Lessee* v. *Dorrance*,) that the confirming Act was a violation of the Constitution of *Pennsylvania*, and therefore null and void, they might have recovered the possession of their lands. Nevertheless, *David Meade*, and some others, who had been put to considerable expense, and trouble, in complying with the conditions of the confirming law, while it remained unsuspended, seemed to have strong claims on the *justice* of the Commonwealth. Indeed its *honour* was deeply concerned, in indemnifying persons who had acted on the faith of an Act of Assembly, and of this the Legislature was sensible. For, by an Act passed the 9th of *March*, 1796, after a recital shewing the merits of *David Meade's Case*, it was enacted, that he should be entitled to a credit, to be entered on the books of the receiver general, "which might be transferred to any person, and passed as credit, *either in taking out new warrants in any part of the State, where vacant lands may be found*, or paying arrearages on former grants." These expressions are clear, and explicit, that *vacant* land might be taken up, wherever it could be found in the State. Why is it then, that those warrants should not be applicable to lands which were *unsettled?* Because, say the plaintiffs in error, the land officers were forbidden to issue warrants for any lands, *except such lands as were settled*, by the Acts of 22d *April*, 1794, and 22d *September*, 1794. But to this, there are several satisfactory answers. In the first place, the Act of *March*, 1796, being subsequent to the Act of 1794, operated as a repeal of them, so far as concerned *David Meade*, and in the next place, *Meade's Case*, was so different from persons in general, who wished to take up vacant land, that it deserved a preference. Neither could the intent of the Act of *March*, 1796, be carried into effect without giving him a preference. The intent was to permit him to take up land *himself*, if he pleased; for the value of his credit on the books of the receiver general would be much diminished, if, instead of taking up land for his own use, he was obliged to sell and transfer his right to others who had made settlements. Moreover,

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the construction contended for, is against the *words* of the Act of Assembly—the construction denies the right of taking up *vacant lands* and confines the warrants to lands which were settled (and not vacant;) whereas the Act of Assembly speaks expressly of *vacant lands*. The construction given to this Act, by the *Board of Property*, soon after its passage, was, that warrants might be issued to affect *unsettled* lands, as was conceded by the Attorney General in the case of the *Commonwealth* v. *Cochran*, 2 *Binn.* 271. And the same construction has been given by the Legislature itself, as plainly appears by an Act passed the 1st *April*, 1805, by which it is provided, that *Meade*, and others in a similar situation, may receive payment from the Treasury, *in money*, or apply their credits to the payment of warrants to be taken out for *lands;* but, in case they elect to take up lands, they shall be liable to the condition of taking up none but *settled* lands. But this condition would have been unnecessary, if, by the Act of *March*, 1796, they were confined to lands which had been *settled*. And last of all, I think the construction of this Act has been settled, by the decision of this Court in the case of the *Commonwealth* v. *Cochran*, 2 *Binn.* 270. That case indeed, arose, not on this Act of Assembly, but on another, expressed in nearly the same words; and if there be any difference between them, it is in favour of *Meade's* warrants. *Peter Wikoff*, and others, had taken up, and paid for, lands supposed to be in *Pennsylvania*, but which turned out to be in *New York*, upon the fixing of the boundary between the two States. In order to compensate these persons, for the lands they had lost, they were permitted to have a credit on the books of the receiver general, which might be transferred to any person, and passed as a credit, *either in taking out new warrants in any part of the State where land may be found*, or in payment of arrears of former grants. This Act was passed the 19th of *February*, 1801, and the Court decided, that warrants issued under it, were applicable to *unsettled land*. The words of the two Acts are precisely the same, except that in the latter, the expressions are, *any part of the State where land may be found*—and in the former, *where vacant land may be found*. The only difference is, the omission of the word *vacant*, in the last Act; which, if it have any sensible effect, is in favour of *Meade's* warrants. Then as to the

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merits of the *persons*, the comparison is altogether in favour of *Meade*. For *Wikoff* had gone beyond the boundaries of the State, and was himself concerned in the mistake, under which lands in *New York* were surveyed. Whereas *Meade* had made *no mistake*, but purchased lands *within the State*; of which he was deprived by a high-handed Act of prerogative, necessary to be sure, but which ought never to be exercised, but in cases of necessity, nor then, without liberal compensation. Upon the whole, when all the circumstances of *Meade's* case, and all the Acts of Assembly which bear upon it, are brought into view, the law is extremely plain, nor should I have thought it necessary to enter into so minute an explanation, had it not been said, that many titles depend on it.

I am of opinion that the judgment should be affirmed.

Judgment affirmed.

Monday, June, 18.

SHELHAMER and another *against* THOMAS.

The acts of an agent, within the scope of his authority, and his declarations or representations, while he is employed in making an authorised agreement, or in acting within the scope of his authority, are binding on his principal.

But representations made by an agent, in a matter in which he is not authorised to act as agent, and to a person with whom his principal has no concern, are not evidence against the principal.

ERROR to the Court of Common Pleas of *Columbia* county.

William Thomas the plaintiff in this ejectment, claimed under an application in the name of *Robert Glen*, dated 3d of *April*, 1769, No. 4. The defendants *John Shelhamer* and *Jeremiah Culp*, claimed under an application, inthe name of *John Huffnagle*, dated 3d of *April*, 1769, No. 41. Surveys adjoining each other were made on these applications .*Glen's* application was the property of *William West*, and *Huffnagle's* was the property of *Edward* and *Joseph Shippen*. A patent issued to *William West*, on the 17th of *January*, 1795,

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and to *Edward* and *Joseph Shippen*, on the 14th *February*, 1770. *West*, having discovered as he supposed, some errors in his survey and patent, (the courses and distances not agreeing with the lines and boundaries marked on the ground,) obtained on the 5th *July*, 1791, an order from the board of property for a resurvey, in order to correct the errors in the original survey and patent. In pursuance of this order, a resurvey was made and returned, and a new patent issued to *West*, on the 16th of *April*, 1792. This resurvey and patent included upwards of sixty acres of *Shippen's* land, which was the subject of the present action. These lands were situated on *Briar* creek, on the waters of which the *Shippens* had also other lands. The plaintiff having given evidence, tending to shew that a certain *Evan Owen* was the agent of Messrs. *Shippen*, for their lands on *Briar* creek, offered to prove by the oath of *Nathan Beach*, "that a short time prior to the resurvey of *West's* land, the said *Evan Owen* advised *Josiah Thomas*, (the father of the plaintiff,) who was about to purchase from *West*, not to purchase immediately, as there was a dispute between *West* and the *Shippens* about the boundaries, which would be settled in a short time: that the said *Owen* attended on the resurvey, as agent for the *Shippens*, soon after which he informed the said *Thomas* that he might purchase in safety, the lines being settled, of which he had informed his principals, Messrs. *Shippen*, who were satisfied, and that in consequence of this information, the said *Thomas* purchased from *West*, and paid his money." To this evidence the defendants objected, but it was admitted by the Court, and an exception was taken to their opinion.

There were also certain questions proposed to the Court below, by the defendants' counsel, which were answered by specific opinions on each, in connection with the general charge, previously given by the Court. The charge and answers were objected to, as not being full answers to the questions proposed. These also were now assigned for errors, but as the Court gave no opinion upon them, it is unnecessary to detail the exceptions or the argument upon them.

Greenough and *Fisher*, for the plaintiffs in error, contended, that the declarations of *Owen* were not proper evidence

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to go to the jury. He was not *Joseph Shippen's* agent; and if he had been, he had no power to bind his principal, as to the admission of boundaries to persons not intending to purchase *Joseph Shippen's* lands. All the evidence given was that *Owen* was the agent respecting the *Briar* creek lands; which shewed no authority to bind the Messrs. *Shippen*, as to the settlement of boundaries, or as to any thing beyond the care of the lands. The rule is well settled, that the declarations of an agent are exceptions to the general rule, requiring evidence to be given on oath, and the exceptions are confined to such statements as are made by him, either at the time of his making the agreement, about which he is employed, or in acting within the scope of his authority. 1 *Phill. Ev.* 83. Besides, the evidence of agency cannot be given by the agent himself: *Nicholson's Lessee* v. *Mifflin*, 2 *Dall*, 246. *Meredith's Lessee* v. *Maus*, 1 *Yeates*, 200. Nor can it consist of the declarations of the agent, *Plumstead's Lessee* v. *Rudibach*, 1 *Yeates*, 502.

Marr and *Hepburn*, contra.

The plaintiff proved by another witness, that *Owen* was said by *Joseph Shippen*, to be agent of all his *Briar* creek land. We had a right to give evidence of the acts and declarations of *Owen*, which were binding on his principal. That a principal is bound by the acts of his agent, there is no doubt. How far a man is agent of another, is matter of fact, and when the jury have ascertained the fact, the conclusion follows of course, *Maclay's Lessee* v. *Work*, 5 *Binn.* 156. An agent has power to settle the boundaries of lands, though not authorised to make a conveyance. In *Meade* v. *M'Dowell*, 5 *Binn.* 195, it is decided, that if one man confides to another the power of making a contract, he confides to him the power of furnishing evidence of the contract; and if the contract, be by parol, subsequent declarations of the party are evidence. These declarations were also evidence to contradict *Owen's* oath that he was not agent: he was the defendant's witness.

The opinion of the Court was delivered by TILGHMAN, C. J., after stating the facts.

What was the extent of *Evan Owen's* power, as agent of the *Shippens*, did not appear. He was examined as a wit-

ness, and denied being an agent as to the lands in dispute, although he said he was agent for all their *other lands in Briar creek*. It was proved however, by another witness, that *Edward Shippen* informed him, that *Owen* was agent for *all his lands on Briar creek*. There was no evidence of any written power, nor did the evidence go further than to shew, that *Owen* was called in general, *Shippen's* agent. Supposing him then to have been the agent, and even to have had power to sell the land, (which he had not, because he had no authority in writing,) his acts, and his agreements, within the scope of his authority, and his declarations, and representations made in the course of the business, would have been binding on his principal. But these declarations and representations would not in strict propriety, have been considered as evidence of particular facts, but rather as part of the contract. The general rule, that facts are to be proved on oath, extends to agents, as well as to other persons; and the exception is confined to acts, statements, or declarations of an agent, while he is employed in making an agreement, or in acting within the scope of his authority. Now it is very clear, that the declarations of *Evan Owen*, do not fall within this exception; for he was making no agreement with *Josiah Thomas*, who never had it in contemplation to purchase the land of *Shippen*. He was transacting no business of *Shippen's*, but giving friendly advice and information to a person, with whom *Shippen* had no concern. If *Edward Shippen* had declared himself satisfied with the lines run on *West's* resurvey, and *Evan Owen* heard him say so, why was not this proved on oath? What puts the impropriety of this evidence in a glaring point of view is, that *Owen* was actually examined on oath as a witness, and proved no such thing, and yet his declaration without oath, went to the jury, and perhaps decided the cause. It has been said, indeed, that the evidence was admissible, in order to destroy the credit of *Owen*, who had sworn that he was not an agent, as to this tract of land. It might have been proper to give evidence of *Owen's* confessions of his being agent, in order to shew the inconsistency between his oath, and his assertions without oath. But his declarations of what he had heard Mr. *Shippen* say, respecting the boundaries of the land, was quite a different thing, and had nothing to do

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with his own inconsistency. That part of the evidence therefore, was clearly improper.

There were other errors, not necessary to be particularly enquired into, as they are principally complaints, that certain questions proposed to the Court below were not fully answered. The cause will be tried again, and that Court will have an opportunity of giving a clear and decisive answer. But it may not be amiss perhaps, to repeat on the present occasion, a suggestion which this Court found it necessary to make, at their last sitting at *Lancaster*. If the Judges of the Courts of Common Pleas, would make it a rule to give a full and distinct answer to each question proposed, without blending the answers with their general charge to the jury, it would prevent that uncertainty which sometimes occurs, and would render it impossible to omit an answer to any question. But the most careful Judge may chance to make an omission, when he undertakes to give a charge, which shall contain an answer to all the questions. For want of a precaution of this kind, we find ourselves under the painful necessity of reversing judgments, on points quite foreign to the merits of the cause.

In the present case, I am of opinion that the judgment should be reversed, and a new trial ordered.

Judgment reversed, and a *venire facias de novo* awarded.

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IDDINGS and others *against* IDDINGS.

IN ERROR.

Monday, June 18.

THIS was a writ of error to the Court of Common Pleas of *Union County*, in which a feigned issue was tried, to determine the validity of a writing purporting to be the last will and testament of *Henry Iddings*, deceased. The plaintiff having given evidence in support of the will by the oaths of the two subscribing witnesses, one of whom was *Jonas Candor*, the scrivener who drew it, the defendants offered to prove on the cross examination of the said *Candor*, that through ignorance he had drawn the will in such a manner as to contradict the intention of the testator. The nature of the mistake was as follows. The testator's estate was principally personal. He had a number of children, to some of whom he had made advances in money, and it was his design to make an equal division of his property among them. In order to effect this, a legacy was given to each, which would have put them all on nearly an equal footing, supposing that the sums advanced to each, were added to their legacy. But the scrivener inserted in the will, a direction to the executors *not to cancel* any of the accounts between the testator and his children; the consequence of which would be, that the children must account for the sums advanced to them, and then their provision would be very unequal. The mistake arose from the scrivener's ignorance of the meaning of the word *cancel*. It appeared that the testator was ninety two years old, and had ten children. The defendants further offered to prove that one of the testator's children was not named in the will, and that the will was extorted from the testator by the importunity and hard usage of *Thomas Iddings*, one of his children. The Court rejected this evidence, and the defendants excepted to their opinion.

Parol evidence is not admissible to shew that a scrivener in drawing a will, inserted words of the meaning of which he was ignorant, in order to vary the effect of its dispositions, although it may be received to explain a latent ambiguity, or to rebut a resulting trust, or in case of fraud or mistake to annul the will.

It seems the rule allowing parol evidence in regard to written instruments, ought rather to be restrained than extended.

But if the scrivener in his examination, state that the testator furnished him with the matter of the will, he may be asked on the cross examination what those instructions were, especially if the

will be attacked on the ground of imbecillity in the testator, and of undue means used to procure it: solely however, with a view to those points: for if the testator was sound and free, the will must stand as it is written.

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Iddings and others v. Iddings.

Jonas Candor, the above mentioned witness, having stated on his examination that the testator furnished him with the matter of the will, the defendants proposed to ask the witness what were the instructions given to him by the testator, and requested him to state them at large. The plaintiff objected to this testimony, and the Court overruled it, and sealed a second bill of exceptions.

The verdict and judgment below, were for the defendant in error, in favour of the will.

Morrell, for the plaintiffs in error.

1. The question is, whether parol evidence is not admissible to shew mistake in the execution of a will. In *Pennsylvania*, the adjudged cases shew that the general rule is well settled, that what passed at the time of the execution of a writing, is proper to shew mistake or fraud. *Hurst* v. *Kirkbride*, 1 *Binn.* 616. *Simpson* v. *Drum*, 6 *Binn.* 481. Even in *England* on a bill for specific performance, chancery allows the defendant to shew by parol proof, that there was a mistake in the instrument, as in *Joynes* v. *Statham*, 3 *Atk.* 388, where the Lord Chancellor allowed the defendant to prove, by parol evidence, that the plaintiff, in writing the agrement, had omitted to insert in it that the rent was to be paid clear of taxes: and it is said to be a very common defence in that Court, that there had been an omission, fraud, or mistake. The same declaration is recognised in *Langley* v. *Brown*, 2 *Atk.* 203. In *Bigleston* v. *Grubb*, 2 *Atk.* 48, a bill was brought for a legacy of 500*l.* in right of a daughter of the testator, notwithstanding a portion had been given her in the father's life-time. Parol evidence was admitted to shew the father gave the legacy in full of what he intended his daughter under the will. In 2 *Munf.* 187, the substitution of a deed for a will was proved by parol. So fraud on the testator may be shewn. *Phill. Ev.* 428. The evidence ought to have been admitted, to shew the weakness of the testator; and in that point of view, it was immaterial whether the scrivener drew the will wrong through fraud or ignorance. He also cited 7 *Bac. Ab.* 380.

2. The defendants below were not permitted to ask what were the testator's instructions to the scrivener: though the

testator had omitted one child entirely, which leads to the conclusion, that he had not capacity. He had ten children, and was ninety-two years old.

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Hepburn, contra, was stopped by the Court on the first bill of exceptions.

2. On the second, he contended, that the question was asked for no purpose but to get in evidence which had been rejected. The testator's sanity was not stated as a matter of dispute.

Greenough, in reply, confined himself to the second bill of exceptions. The question proposed, as mentioned in the second bill of exceptions, was on the cross examination of a witness, produced by the adverse party. Having stated that the testator furnished him with the matter of the will, we were entitled to know what that matter was. If the evidence was good in itself for any purpose, it is sufficient; and the party offering the evidence is not bound to state its object unless requested. 4 *Binn.* 198. The instructions were very material in order to investigate any fraud that may have existed.

The opinion of the Court was delivered by

TILGHMAN C. J.—This may be a very unfortunate mistake for some of the children of the testator, but I am clearly of opinion that the evidence was not admissible. Our law requires that wills should be in writing, and proved by two witnesses. But if the writing is to be contradicted by parol evidence, the object of the law will be defeated and all certainty destroyed. It is very common for scriveners to make mistakes, particularly where they make use of technical words, which they are fond of doing. But, if these mistakes were to be corrected by the scrivener's recollection of his conversation with the testator, it would open such a door for perjury and confusion, as would render wills of very little use. The rule of law therefore is, that the writing is not to be *altered*, or *explained* by evidence *aliunde*. But this rule is not so unbending as to admit of no exception. It may happen, that expressions apparently certain, may be rendered uncertain, by something peculiar in the *person*, or the *subject*,

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to which they are applied. A man has two sons of the name of *John*, and devises land to his *son John*. The uncertainty is made to appear by parol evidence, that there are two sons called *John*. It is permitted therefore, to remove this uncertainty by other parol evidence, shewing which son was intended. Without this evidence, the devise would be void, and in truth, its object is, to explain a doubt arising not on the will, but on a matter out of the will. But, if a doubt should arise on the face of the will, (an ambiguity patent as it is called,) it is not to be explained by parol evidence. So parol evidence has been admitted, to rebut a resulting trust. Neither is this in contradiction of the written will. The trust is not declared by the will, but raised by operation of law. The legal presumption may therefore be encountered by parol evidence of the testator's intention. But the *written will* is preserved, without addition or diminution. In the case of *fraud* too, always the subject of the laws abhorrence, evidence is admitted, not for the purpose of *explaining*, or *altering* the writing, but of shewing it to be *void*. If, instead of the will which a man has read, and intends to execute, another is substituted which he executes, it is evident that this is not his will, and proof of this fraud is permitted. So I apprehend, the truth might be shown, if by *mistake*, the wrong paper was executed and the testator died before there was time to correct the error. These are, in general, the cases in which parol evidence is allowed, although I will not say that there may not be others. Now the case before us, is very different from any I have mentioned, for there is no *latent* ambiguity, no *fraud*, no *resulting trust*. The will was read to the testator, and executed by him, without any kind of mistake or imposition as to the paper itself. The mistake, if there was one, was in the meaning of a very common word, (*cancel.*) I have mentioned the rule of law, and will refer to good authorities to prove it, although I shall not undertake the useless, and endless labour, of examining all the cases in the books on the subject of parol evidence. The case of *Brown* v. *Selwyn*, is strong to this point, and I select it because, it was affirmed by the house of lords in *England*, and has been recognised by our Courts. In that case, (reported in *Cas. temp. Talb.* 240, and 4 *Bro. P. C.* 176. 186,) the testator had devised the residue of his estate, to his

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two executors equally, and it was offered to be proved, that he had given instructions to the person who drew his will, to release a debt due on bond from one of his executors, but the evidence was rejected. In the case of *Mann and others* v. *Mann and others*, (1 *John. Cha. Rep.* 231,) where the law on this subject of parol evidence is laid down with great learning and accuracy by Chancellor KENT, *Brown* v. *Selwyn* is cited and relied on, as it is also in *Torbert* v. *Twining and others*, decided by *this Court* in the year 1795, (1 *Yeates*. 432.) The case of *M'Dermot* v. *The United States Insurance Company*, (3 *Serg. & Rawle* 604,) decided by us in 1818, adheres to the same principle of rejecting parol evidence, with the exceptions which I have mentioned. In short, it may be affirmed without hesitation, that the current of authority runs strong in the same channel, although it cannot be asserted that all the cases are in unison. For my own part, being convinced by experience, of the danger of parol evidence, I am more inclined to shut the door, than throw it wider open. I concur therefore with the opinion of the Court below in the present instance. But there is another bill of exceptions in this cause. The counsel for the defendant offered to ask the same witness, (the scrivener who drew the will,) what were the instructions which he received from the testator. This question the Court would not permit to be asked. But when it is considered, that this witness, who had been produced by the plaintiff, had before declared, on his examination in chief, "*that the testator furnished him with the matter of the will*," there can be no doubt, but the defendant ought to have been permitted to ask, in the cross examination, *what that matter was*. Besides, as the defendants opposed the will in *toto*, on the ground of its being obtained from an old man above the age of ninety, by the excessive importunity and harsh treatment of his son *Thomas*, it was very proper that the jury should be informed of all circumstances attending the drawing and execution of it. Who were present, what the old man said, whether any person interfered, or prompted him, in giving the instructions, how it happened that the name of one of his children was entirely omitted, (for that is said to be the case,) all these, and other circumstances, might have been material, in forming a judgment of the state of the testator's intellects. The evidence therefore should have been admitted, solely

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with a view to that object, and at the same time the jury should have been warned in pointed terms, that if the testator was of a sound mind, and free from duress, the will was to stand as it was written, without regard to the instructions. My opinion is, that in the second bill of exceptions there is error, and therefore the judgment should be reversed and a new trial ordered.

Judgment reversed and a *venire facias de novo* awarded.

PATTON's administrators *against* ASH and another who survived TYBOUT, administrators of CRAIG.*

Monday, June 25.

IN ERROR.

If, in a civil cause, the mode of alternate challenge be adopted under the Act of Assembly, it must be persevered in to the end; and if the plaintiff commence, and then wave his right, when the second challenge comes to him, he cannot resume it again.

ERROR to the Court of Common Pleas of *Northumberland* county.

An administrator who is one of the plaintiffs in the suit may be examined as a witness for the plaintiffs, after he has executed a release to the heirs of his claims to commission and has paid to the prothonotary a sum sufficient to pay all costs which have accrued or may accrue, to be applied to such payment, let the verdict be as it may, unless it appear that he is in danger of being involved in a *devastavit*.

A naked check payable to one or bearer is not evidence *per se* of payment to the person whose name is inserted. It is necessary, in order to establish such payment, to prove that the payee received the money at the bank; and, in order to charge him as debtor, some evidence should be given to shew that the check was not given in payment of a debt due by the drawer.

Finding a check cancelled among the drawer's papers is not evidence of such payment.

After introductory evidence tending to shew that such payment was made as a loan to the payee, the bank book of the drawer, if the entries are duly proved, and with it the check* itself, are evidence by way of corroboration; but a bank book is not evidence, without proving the entries by the clerk of the bank who made them, unless it appears to be out of the power of the party to do so.

If it clearly appear that payments by the plaintiffs for the defendant were made on account of an unsettled partnership concern existing between them, they cannot be recovered in *assumpsit*; but, unless this clearly appear, the Court may receive evidence of them, and give them in charge to the jury, explaining the liability of the defendant.

A copy of a letter proved to be a true copy of an original, put in the post-office, directed to the defendants' intestate, without notice to produce the original, is not evidence.

The defendants' intestate wrote a letter to one of the plaintiffs' administrators, stating that he had received a copy of the plaintiffs' intestate's account against him, and also that he had made out from his own books his own account against him, but had lost them; and requested another copy of the account made out and sent to him; and as soon as he received his books, which he expected soon, he would have his own made out again; and concluded by saying, "I will write to you again some time hence, and inform you when I will again return to the city, to put a close to this affair in the best manner I can." *Held*, the jury ought to be directed that it was sufficient to authorise them to presume a new promise within six years, unless they were satisfied that it had no reference to the affairs on which the suit was founded.

* For a former report of this case, see 3 *Serg. & Rawle*, 300.

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This action was brought by *James Ash* and *William Hall*, surviving administrators of *James Craig*, deceased, against the administrators of *John Patton*, deceased. The declaration contained, besides the usual money counts, an *indebitatus assumpsit* and *quantum valebant* for goods sold and delivered, an *insimul computassent*, and also a count laying an assumption by *Patton* in his life time, to the administrators of *Craig* themselves. The defendants pleaded *non assumpserunt*, the act of limitations, and *plene administraverunt*, on all which issues were joined. On the trial of the cause in the Court below, the defendants took eight bills of exceptions to matters arising on the trial, and also an exception to the charge of the Court.

The first exception was to the challenge of a juror claimed by the plaintiffs' counsel, and allowed by the Court, under the following circumstances. The jury being called, the plaintiffs peremptorily challenged *Daniel Hoofman*: and another juror being called, the defendants challenged *Robert Campbell.* Another juror being called, the plaintiffs waved a second challenge, whereupon the defendants challenged *Abraham Campbell.* Another juror being then called into the box, *viz. John Buyers*, the defendants requested the jury to be sworn. The plaintiffs claimed the right peremptorily to challenge the said *Buyers.* The defendants objected to the right, but the Court permitted it.

The second exception was to the admission of *James Ash*, as a witness for the plaintiffs. He was one of the plaintiffs on record, but previous to his admission, he had executed a release to the heirs of *James Craig*, of all claims to compensation, by way of commission, and had paid to the prothonotary of the Court, a sum of money, admitted to be sufficient for the payment of all costs, accrued or which might accrue in this suit, to be applied to the payment of these costs, let the verdict be as it might; so that in any event, the whole costs were paid by the said *Ash;* and he had agreed, that in no event was any part of the money to be refunded.

The third exception was abandoned in this Court, and therefore need not be specified.

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The fourth exception was to the admission of *James Craig's* bank book, containing his account with the bank of *Pennsylvania*, and a check drawn by *James Craig*, on the bank of *Pennsylvania*, dated the 20th of *May*, 1795, for 1679 dollars, payable to *John Patton*, or bearer. To explain this exception, it will be necessary to take into view some of the evidence given before the bank book and check were offered. It had been proved by the oath of *James Ash*, that at the earnest solicitation of *John Patton*, and for his accommodation, a note had been drawn by the said *Ash*, payable to *Patton* for 2000 dollars, dated the 15th of *May*, 1795. This note was indorsed by *Patton* and *Craig*, and discounted by the bank of *Pennsylvania*. *Patton* received the money, but as *Craig* was the last indorser, and consequently the money was placed to his credit in the bank, it was necessary that he should draw a check, in order to enable *Patton* to receive the money. *Ash* proved also that he being liable to the bank, as drawer of the note for 2000 dollars, received full satisfaction from *Craig*, so that in fact *Craig* lent the money to *Patton*. It was then proved by *Ash*, that the book was the bank book of *Craig*, that the signature of *Craig* to the check, was his hand writing, that the check bore the mark of having been cancelled in the bank of *Pennsylvania*, and both book and check were found by him, after *Craig's* death, among his papers.

Fifth exception. The plaintiffs offered an exemplification of the record of the Supreme Court, of a suit brought there to *September* Term, 1785, by *James Seagrave*, against *John Redman*, *James Craig*, *John Patton*, *James Montgomery*, and *Philip Moore*, in which judgment was entered on the 11th of *December*, 1797, for $4026, 87½ cents, and offered to prove that *Craig* paid for *Patton*, his share of the judgment. This record and testimony were admitted by the Court, and the defendants excepted.

Sixth exception. The plaintiffs offered to prove that *Craig* paid the whole of this judgment, and costs of suit: that two of the defendants in that suit, *viz. Redman* and *Moore*, were insolvent; and also to shew the proportion that each defendant ought to have paid, of which *Patton's*

proportion was one-sixteenth. This evidence was also allowed by the Court, and an exception taken by the defendants. 1821. *Sunbury.*

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Seventh exception. The plaintiffs offered evidence to prove, that a note for 350 pounds was given by *Patton* and *Craig*, to a certain *John Wright Hanley*, as the witness presumed for the purchase of a brig, called the *Sukey*, purchased by them, which vessel *Ash* and another became interested in, and was sent by the owners on a voyage, and that *Craig* had paid *Patton's* half of this note. This evidence the Court admitted, and an exception was taken by the defendants.

The eighth exception was to the admission in evidence of a number of letters from *Patton* to *Craig*, and to *Ash*, and of a copy of a letter from *Ash* to *Patton*, proved by *Ash* to be a true copy in his hand writing, of a letter directed to *Patton*, and put into the post-office.

The last exception was to the charge of the Court, on the subject of the Act of Limitations. The transactions on which the plaintiff's claim was founded, took place more than six years before the commencement of the action. To take the case out of the act, the plaintiffs relied on several letters of *Patton*, but more particularly on one to *James Ash*, dated the 16th of *November*, 1802. And the opinion of the Court was expressly asked by the defendants on this point. The Court's answer was as follows. "To take the case out of the Statute of Limitations, there must be an acknowledgement of a subsisting debt, or a promise to pay within six years before the action was brought, and the acknowledgement and promise to pay must have a direct reference to the demand made by the plaintiffs, which fact the jury must determine from the evidence in this cause."—The letter was as follows:

Centre County, 16*th Nov.* 1802.

Dear Sir,

My trunks containing my books and papers, were in a private room, at *Dunwoody's* open; some time before I left the city, I searched for Captain *Craig's* account

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and my own, that I had drawn out, but could not find them. My books are now at *Harrisburg*, I expect to receive them shortly, and as soon as their arrival here, shall have my account made out again. In the mean time, I beg the favour of you to have the other made out, and forward to me by some safe hand. I am sorry to put you to this trouble, but it is unavoidable from the circumstance mentioned.

I will write you again sometime hence, and inform you when I shall return to the city to put a close to this affair, in the best manner I can.

I am &c.

John Patton.

James Ash, Esq.

Carothers and *Burnside*, for the plaintiffs in error.

1. The Court ought not to have permitted the plaintiffs to make a second challenge, after waving the right of challenge when it came to his turn, as appears by the bill of exceptions. The Act of Assembly of the 4th *April*, 1809, provides, that in all civil suits each party shall be allowed to challenge two jurors peremptorily. *Purd, Dig.* 347. The mode of conducting the challenges in criminal cases is pointed out by the Act of 29th *March*, 1813, and that Act furnishes a guide in civil cases. By that Act, *Purd. Dig.* 348, the Commonwealth and the defendant challenge alternately, and it specially enacts, that if the Commonwealth should refuse to make any challenge, the defendant's right to challenge is not taken away. So in the present case, when the plaintiffs refused to challenge a second juror, his right was gone, though the other party might exercise it. Each waver amounts to a relinquishment of one challenge. The plaintiffs wished to gain an advantage by refusing to challenge in their turn and insisting on challenging out of their turn. The Court of Common Pleas cannot establish a practice independent of the control of this Court. The practice on this point should be uniform throughout the State.

2. This point considering the opinion of the Court on the former writ of error, we shall not enlarge upon, although we desire the opinion of the Court upon it. Much injustice and perjury is produced by suffering witnesses to divest themselves of interest in the cause, at the bar.

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4. *Craig's* bank book and check, were both improper evidence. It is doubtful whether the check was evidence even connected with the circumstances proved: but as to the bank book, it certainly was not, without proving the entries in it by the bank clerk who made them. 2 *Esp. N. P.* 495. 473. 4 *Esp. N. P. Rep.* 9. No steps whatever had been taken to procure this proof, and therefore length of time is no argument.

5, 6, & 7. These bills of exceptions depend on the same principle. We objected to the evidence because it related to a partnership transaction, which partnership was proved by the plaintiffs themselves. Account render is the only proper action between partners, until the account is settled; and here was no evidence of the settlement of this partnership account. It is well settled that no action of assumpsit lies by one partner against another, without an express promise. 2 *Caines Rep.* 293. *Ozeas* v. *Johnson*, 1 *Binn.* 193.

The copy of the letter from *Ash* to *Patton*, was certainly not evidence. We were not called on to produce the original, nor was it proved that it ever came to *Patton's* hands. *Ash* merely proved that he put it into the post office.

As to the charge of the Court: the letter of *Patton* did not refer with certainty to the account which is the subject of this suit, and the Judge should have told the jury that unless the letter did so refer, it could have no effect on the Statute of Limitations; or perhaps the jury should have been told expressly that this letter had no effect on that Statute. The principles in relation to the efficacy of an acknowledgment in taking the case out of the Acts of Limitations have been much restricted of late, and the prevalent opinion is, that Judges have gone quite far enough. In *Clemenson* v. *Williams*, 8 *Cranch*, 72, it is held, that an acknowledgment that a debt was originally due is not enough: it must be an acknowledgment that it is due. So it is decided in *Kentucky*, that there must be an express acknowledgment of a debt due at the time of the acknowledgment. *Hardin's Kent. Rep.* 301.

Greenough and *Hepburn*, contra.

1. The Act of Assembly gives the right to challenge two jurors, and in this case the plaintiffs challenged only two. The Act does not prescribe the mode of challenge: that is a

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matter which depends on the practice of the Court, and in which different Courts vary. The practice in this district is conformable to the course pursued in the present case. There was no waver of a further right of challenge, but only as to the original pannel. When the defendants by their second challenge brought a new juror into the box, we claimed the right to challenge him: and that right could not have been waved before, as it did not exist in regard to the juror then brought in.

2. As to the competency of *Ash*, that question is fully settled by the former opinion of the Court in this case. 3 *Serg & Rawle*, 300, and by numerous authorities. 3 *Binn.* 506. 6 *Binn.* 16. *Phill. Ev.* 36. 57. 6 *Binn.* 481. 2. *Dall.* 172. 4 *Dall.* 137.

4. The bank book and check, were evidence after what had passed. It was an old transaction, having taken place twenty-five years before the trial. In *Egg* v. *Barnet*, 3 *Esp. N. P. Rep.* 196, it was held, that a check on the back of which was the name of the person to whom it was paid, coupled with other transactions, was evidence. As to the bank book, it was proved to be *Craig's*, and the entry corresponded exactly with *Ash's* evidence. It could not be expected at the end of twenty-five years, that evidence could be produced of the hand writing of the clerk of the bank, who made the entries. They cited 2 *Yeates*, 477. 4 *Binn.* 198.

5, 6, & 7. The objection is, that it was a partnership concern. But here was no acknowledged partnership, and it was for the jury to decide whether there had been a partnership. We deny that they were partners. They owned a ship in certain proportions, and might each sue the other. 1 *East*, 20. Account render would not lie against *Patton's* administrators; he never received the money of *Craig*. 5 *Binn.* 564. 1 *Bac. Ab.* 36. 1 *Caines*, 188. 2 *Johns. Cas.* 329. 10 *Johns. Rep.* 226. 9 *Johns. Rep.* 470.

8. We offered a number of letters together, and they were objected to altogether: no particular objection was made to the copy as a copy.

As to the charge of the Court. It was proper to leave the question as to the acknowledgment, to the jury, because it depended on various letters, some of them referring to matters extrinsic to the letters themselves. The letter of

16th *November*, 1802, referred to accounts, the facts respecting which, were necessary to elucidate the meaning of the parties, and none but the jury could determine this. It is the rule, that when the writing is ambiguous, it should be left to the jury. *Miles* v. *Moodie*, 3 *Serg & Rawle*, 211. 1 *Esp. N. P. (Gould's Ed.)* 219. 1 *Binn.* 212. 5 *Binn.* 573. 1 *Serg. & Rawle*, 179.

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The opinion of the Court was delivered by

TILGHMAN C. J.—On the trial of this cause in the Court below, the defendants' counsel took eight bills of exceptions to evidence, and also an exception to the charge of the Court. Each of these shall be considered in the order in which they stand on the record.

The 1st exception was, to the challenge of a juror, claimed by the plaintiffs' counsel, and admitted by the Court. The Act of 4th *April*, 1809, (*5 Sm. L.* 59,) gives to each party, in all civil suits, the right of challenging two jurors peremptorily, but does not direct the mode in which the challenge shall be made. It has been the general practice for the plaintiff to challenge one juror *from the whole pannel first.* It was so done in the present case; after which, the defendant challenged one. It has also been the practice in this, and other judicial districts, to summon a talesman in the place of each juror that has been challenged, immediately after the challenge. So also it was done in this case. After the defendant had made his first challenge, the right of making a second challenge came to the plaintiff; and it is stated on the record, that *he waved a second challenge.* Upon this the defendant made a second challenge, and a juror having been summoned in the room of the one so challenged, the plaintiff claimed the right of challenging him, and the Court permitted the challenge. In this, I think there was error. If the plaintiff waved the second challenge, when it came to his turn to make it, he should not be permitted to resume it again. It would give him an unfair advantage. The mode of alternate challenge, having been commenced, must be preserved with uniformity to the end. The plaintiff had a right to wave his challenge, but having waved it, he must abide by it.

The second exception was to the admission of *James Ash*, as a witness. He is one of the plaintiffs on the record, but

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previous to his admission, he had executed a release to the heirs of *James Craig*, of all claims to compensation by way of commission, and had paid to the prothonotary of the Court, a sum of money admitted to be sufficient for the payment of all costs accrued or which may accrue in this suit, to be applied to the payment of these costs, let the verdict be as it may; so that in every event the whole costs were paid by the said *Ash*, and he had agreed that in no event was any part of the money to be refunded. Thus he stood completely divested of all interest, actual or contingent. Thus circumstanced, I have no doubt that he was a competent witness. He was a bare trustee, at the commencement of the action, and there is no suggestion that he was in any danger of being involved in a *devastavit*. If any thing of that kind had appeared, he would have been interested. It was decided by this Court, in the case of *Steele* v. *The Phœnix Insurance Company*, (3 *Binn.* 306,) that the bare circumstance of being a plaintiff on record, did not render a man incompetent, provided he was free from interest when he was offered as a witness. This principle has been ever since acted upon in all the Courts, and may be considered as the law of the land. I speak of it as a general principle, to which there may be exceptions, when witnesses are offered under circumstances of strong suspicion. To attempt now, an examination of all possible exceptions is unnecessary, and would be dangerous. I only wish it to be understood, that there may be cases in which a witness may be offered, under circumstances sufficient to exclude him, although he cannot be proved to be absolutely interested. But in the present instance, it does not appear that Mr. *Ash* ever had any interest, except what might arise from his commission as an administrator, and from his being liable to the costs of suit; and having completely discharged himself from both these, and standing under no suspicion whatever of improper conduct, in order to make himself a witness, he was *competent* upon principles well established. In his admission, therefore, there was no error.

The third exception has been abandoned by the plaintiffs in error.

The 4th exception was to the admission of *James Craig's* bank book, (containing his account with the bank of *Pennsyl-*

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vania,) and a check drawn by *James Craig* on the bank of *Pennsylvania*, dated 20th *May*, 1795, for 1979 dollars, payable to *James Patton*, or bearer. To decide this exception, it will be necessary to take into view some of the evidence which had been given, before the bank book and check were offered. It had been proved by the oath of *James Ash*, that at the earnest solicitation of *John Patton*, and for his accommodation, a note had been drawn by the said *Ash*, payable to *Patton* for 2000 dollars, dated *May* 15th, 1795. This note was indorsed by *Patton* and *Craig*, and discounted by the bank of *Pennsylvania*. *Patton* received the money, but as *Craig* was the last indorsor, and consequently the money was placed to his credit in the bank, it was necessary that he should draw a check, in order to enable *Patton* to receive the money. *Ash* proved also, that he, being liable to the bank, as drawer of the note for 2000 dollars, received full satisfaction from *Craig*, so that in fact, *Craig* lent the money to *Patton*. It was then proved by *Ash*, that the book was the bank book of *Craig*, that the signature of *Craig* to the check, was his hand writing, that the check bore the mark of having been cancelled in the bank of *Pennsylvania*, and both book and check were found by him, after *Craig's* death, among his papers. It is evident then, at the first glance, that not only were this book and check in direct corroboration of *Ash's* testimony, but they were so connected with it as to form a link which ought not to have been broken; and had they not been produced, the defendants might well have remarked, that *Ash's* testimony was suspicious, as it stood unsupported by the bank book and check, which were in his power, and which would either verify or disprove what he had sworn. A naked check, payable to one or bearer, is not evidence *per se* of payment to the person whose name is inserted—because the bank pays to *the bearer*, whoever he may be. It is necessary therefore to prove, that the person to whom payable, received the money at the bank. And even then, it may be expected, that in order to charge such person with *a debt*, some evidence should be giving, to explain the consideration of the check; for it may have been given in payment of a debt due from the drawer. In the present case however, after the introductory testimony of *James Ash*, the book and check, would undoubtedly have been evidence, provided the usual

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proof had been made, of the truth of the entries in the bank book. These entries are always made, by one of the clerks of the bank. It is necessary therefore, that they should be proved by the clerk who made them, or in case of his death his hand writing should be proved. It is not enough that this book, was the bank book of *Craig*. He might have made entries in it himself, or procured them to be made by some other person, not a clerk of the bank; and such entries would not be evidence. In ancient transactions, great allowance will be made for the difficulty of proof. But it should be shewn, that such difficulty exists. The plaintiff took no step whatever to prove the entries in *Craig's* book. For any thing that we know, the clerk may be living, or, if dead, his writing may be well known. In all probability it is well known. I have often seen bank books given in evidence, but never without the entries being verified by the oath of the clerk who made them, unless such proof was dispensed with by the adverse party. I am therefore of opinion, that for want of such proof, the bank book of *James Craig* was not evidence. Neither do I think the check was evidence, because there was not sufficient proof that *Patton* received the money from the bank. *James Ash's* testimony was general; that *Patton* got the money, and that he could not have received it without *Craig's* check; but he did not pretend to say, that within his own knowledge, the check was paid to *Patton*, or that it was paid to any body. He found it, cancelled, among *Craig's* papers, and therefore presumed it was paid. But, with the bank book, the check would have been evidence, because it would then have appeared, that the check was paid by the bank, and connected with the other circumstances proved by *Ash*, it should have gone to the jury, who might well have inferred that the payment was to *Patton*.

The 5, 6, and 7th, exceptions depend on one principle and may be considered together. The Plaintiffs offered in evidence, the record of a judgment in the Supreme Court, the 11th *December*, 1797, for *James Seagrave* against *John Patton*, *James Craig*, and three other persons, for the sum of 4026 dollars, 87½ cents, and also offered to prove that *Craig* paid *Patton's* proportion of this judgment. They also offered in evidence, a note for 350 pounds, from *Patton* and *Craig*, to a certain *John Wright Stanly*, and offered to prove

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that *Craig* paid *Patton's* half of this note. The evidence was admitted, although the defendants objected to it, alleging that their payments were in the course of partnership transactions, and therefore could not be recoverable in the present action, or in any other, than an action of account render. Had it clearly appeared, that unsettled partnership transactions were involved in these payments, the objection might have been good. But it did not clearly appear so, and whether or no it was a partnership transaction, the jury might judge. It is not to be supposed, that the defendants were injured by the admission of this evidence, because the Court gave it in positive charge to the jury, that if the payments related to a partnership account, the plaintiffs could not recover on them, in this action, unless the partnership accounts had been previously settled, or *Patton* had made an express promise to pay. Thus qualified, I perceive no error in the admission of the evidence.

The 8th exception, was to the admission of a number of letters from *Patton* to *Craig*, and to *Ash*, all admitted to be the hand writing of *Patton*, and the *copy* of a letter from *Ash* to *Patton*. These letters were offered all together, and the defendant objected to all and each of them. There is not a particle of doubt on this exception. The letters of *Patton* were clearly evidence, and the copy of *Ash's* letter, as clearly not evidence. For although *Ash* proved, that it was a true copy of the original, which was directed to *John Patton*, and put into the post office, yet it is against principle, to admit the copy of any private paper, without accounting for the non production of the original. A copy, in its nature, is less satisfactory evidence than the original. And when the original is in the hands of the adverse party, notice should be given to him to produce it. In this case notice was not given, and therefore the copy was not evidence.

The last exception is to the charge of the Court, on the subject of the Act of Limitations. The transactions on which the plaintiffs' claim was founded, took place more than six years before the commencement of the action. To take the case out of the Act, the plaintiffs relied on several letters of Mr. *Patton*, but more particularly on one to *James Ash*, dated the 16th of *November*, 1802. And the opinion of the Court was expressly asked, by the defendants' counsel on

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this point. The Court's answer to this question, (the fifth question proposed by the defendants' counsel,) which is to be considered as part of the charge, is in the following terms. "To take the case out of the Statute of Limitations, there must be an acknowledgment of a subsisting debt, or a promise to pay, within six years before the action brought, and the acknowledgment and promise to pay must have a direct reference to the demand now made by the plaintiffs, which fact the jury must determine from the evidence in this cause." The defendants' objection to this opinion, is, "that *Patton's* letter did not refer with certainty to the account, which is the subject of this suit; and the Judge should have told the jury, that unless the letter did so refer, it could have no effect on the Statute of Limitations, or rather he should have told them, that this letter had no effect on the Statute."

Let us examine this letter then, and see what force there is in the objection. It appears, from the letter, that *Patton* had received from *Ash*, a copy of *Craig's* account against him; and also that he had made out from his own books, his own account against *Craig*, but had lost them both. He therefore requests *Ash* to have another copy of *Craig's* account made out and sent to him, and informs him, that as soon as he has received his books, which he expected to do soon, (they were then at *Harrisburg*, on the way from *Philadelphia* to *Patton's* house in *Centre* county,) he would have his own account made out again; the letter concludes with saying, "I will write you again some time hence, and inform you when I will again return to the city, and put a close to this affair in the best manner I can."

Now, we see that in this letter, *Patton* expressly acknowledged an unsettled account with *Craig's* estate, and an intention to close it. By closing it, I understand *paying it*, if the balance should be against him. It would have been most extraordinary indeed, if the Court had directed the jury that this letter could have no effect on the Statute of Limitations. If the Judge had passed any opinion upon it, he might truly have said, that it was quite sufficient, to authorise the jury to presume a new promise within six years, unless they were satisfied, that it had no reference to the affairs, on which the action is founded. But it ought not to have been taken from the jury entirely, because there was a reference to accounts,

of which the jury, and they only had a right to judge. In my opinion, therefore, the charge was on this point, more favourable to the defendants than their case deserved; but of that, they have no right to complain.

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On the whole, I am of opinion that the judgment should be reversed, and a new trial ordered.

DUNCAN J. gave no opinion, having been counsel for the plaintiff in error.

Judgment reversed and a *venire facias de novo* awarded.

MILLER and others *against* SHAW.

IN ERROR. *June.*

ERROR to the Court of Common Pleas of *Lycoming* county, in an ejectment brought by *Henry Miller*, *James Ash*, *Andrew Garrigues* and *David Watts*, Esq. against *John Shaw*.

A person, who, without title or colour of title, enters on unseated land, which has been surveyed and patented to another, acquires a right, under the statute of limitations, by twenty-one years' possession, only to so much as he actually cultivates or incloses.

The plaintiffs in error, who were also plaintiffs below in this ejectment, gave in evidence a warrant for 300 acres of land, to *Samuel Nichols*, another for the same quantity to *William Nichols*, and another to *Francis Nichols*, for the same quantity, all dated in *May*, 1789; on which adjoining surveys were made in *May*, 1790, and returned in *March*, 1793. To these surveys, the plaintiffs deduced a regular title, by sundry conveyances, down to themselves.

Entering on land and making a survey, if done *animo clamandi*, may amount to entry and claim; but if the intent be doubtful, the question, whether it is an entry and claim, is for the jury.

So also the jury are to decide on doubtful conversations, how far they amount to a recognition of title.

A mere levy by the Sheriff and sale of 1000 acres, without mentioning the party's name, or that the land was in his possession, and without entry by the Sheriff, are not sufficient to establish an entry on such party, by a person claiming under such Sheriff's sale.

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The defendant shewed no title, but proved that he entered on part of the land included in the survey of *William Nichols*, about the year 1792, and resided there ever since, extending his cultivation and improvements from time to time. More than twenty one years had elapsed from the time of the defendant's entry, to the commencement of this suit; in consequence of which, he contended that he had good title to 400 acres of land, by virtue of his improvement and the Act of Limitations.

In answer to the Act of Limitations, the plaintiffs relied on an entry made on the land, in the year 1806, by *Henry Donnel*, a surveyor, for the purpose of running the lines of the original survey, and an actual running of those lines, and a conversation between *Donnel* and the defendant, in which the defendant expressed an intention to go to the plaintiffs, and purchase of them, if they had title. But it did not appear by what authority, or at whose request *Donnel* entered and made the survey; nor whether there was an intent, to enter in order to interrupt the defendant's possession. They also relied on a levy and sale of the land, included in the three surveys before mentioned, by the Sheriff, by virtue of an execution, issued on a judgment for *James* and *William Miller* against *Alexander Scott*, about the year 1802, under which levy and sale the plaintiffs made title. The levy returned purported to be on 1000 acres of land, in *Nippenose* valley, adjoining *Jonathan Walker*. The plaintiffs further contended, that the defendant could hold no more land by the Act of Limitations, than had been included within his fence for twenty-one years, before the commencement of this action.

The President of the Court of Common Pleas in his charge to the jury, left it to them to decide "whether the acts of *Henry Donnel*, in making a survey, were authorised by any of the plaintiffs, and if they were, whether they amounted to an entry and claim." He also left it to the jury to determine, "whether the levy and sale by the Sheriff, would amount to an entry and claim." And with respect to the defendant's possession, the President charged, "that if the jury believed, that the defendant entered upon the land

with a *bona fide* intention of making an improvement, by which he could obtain a right of pre-emption from the Commonwealth for 3 or 400 acres of land, and made his improvements under that belief, it was the Court's opinion that would constitute an adverse possession."

The plaintiffs excepted to this charge, and the jury found a verdict for the defendant.

Hepburn and *Greenough* for the plaintiffs in error now contended,

1. That making a survey on the land, and the levy and sale by the Sheriff, amounted to an entry and claim, and cited 3 *Bl. Com.* 175.

2. It was the duty of the Court to charge the jury, as to the legal effect of the evidence, though not asked. They left it to the jury to decide whether the acts and words of *Donnel* amounted to an entry: but this was matter of law, and should not have been left to the jury.

3. The Court erred in instructing the jury, that a settlement or improvement, which would entitle the defendant to 3 or 400 acres, was such adverse possession, as would bar the recovery of the plaintiffs. There can be no settlement upon any but vacant land. One who enters upon land which has been appropriated, is a trespasser, and he can hold under the Act of Limitations no farther than his trespass has extended. He can have no constructive possession. He can possess only what he actually occupies: the possession of all beyond that remains, in the legal owner, on whom it is cast by the law. To divest this, and enable the Act of Limitations to operate, the possession of an intruder must be adverse: and it is only adverse so far as it actually extends. The consequences of an opposite doctrine would be highly mischievous. Suppose an intruder enters on 1000 acres, surveyed on a lottery warrant, or on a 5000 acre tract, surveyed under a special warrant, and should claim the whole, would that give title to the whole, under the Act of Limitations, when perhaps not more than 50 acres were actually occupied by the intruder? The principle that there must be an actual occupancy to constitute a defence under the Act of Limitations, and that the party can go no further, is established by a variety

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of cases *Brandt* v. *Ogden*, 1 *Johns.* 158. *Kincard* v. *Scott*, 12 *Johns.* 368. 2 *Johns.* 230, cited 2 *Sm. Laws*, 307. 2 *Bay.* 491. *Johnston* v. *Irwin*, 8 *Serg. & Rawle*, 291. *Hall* v. *Powell*, 4 *Serg. & Rawle*, 456. *Pott's Lessee* v. *Gilbert*, Circ. Co. U. S. *Philadelphia*, *April*, 1818, 3 *Johns. Cas.* 124, 125. *Cluggage* v. *Duncan's Lessee*, 1 *Serg. & Rawle*, 113.

Burnside and *Hall*, contra.

1. The running round the land by *Donnel* was not an entry which could affect the possession of the defendant. Nor was it affected by the defendant's saying that if the plaintiffs had good title, he would purchase of them; because he was afterwards satisfied that they had no title, having never had a survey.

2. The evidence did not prove that an entry was ever made for the purpose of taking possession. It was fairly left to the jury as a question of fact. Sending a surveyor to explore the land is not an authority to enter. If the Judge had charged on the law, it ought to have been against the plaintiffs. As to the Sheriff's sale, it was of 1000 acres adjoining *Jonathan Walker:* that can have no effect on the defendant's possession.

3. This is the main question: and it is a point which never has been decided in *Pennsylvania.* In the case of *Hall* v. *Powell*, this Court abstained from deciding it. *Johnston* v. *Irwin* was a different case. We contend that the law is, that if one without title enter on a 400 acre tract, and hold possession of part for twenty-one years, his possession extends to the whole tract. The object of a man who settles in the woods, is to acquire a tract of land, a farm, which shall contain both cleared and wood land. He may hold by constructive possession all that he has ascertained, either by marked lines, or by declaring that he claims up to some known object, such as a mountain, a stream of water, or up to the bounds of the surveyed tract, on which he entered. But he is not in constructive possession of all the lands within the lines of the surveyed tract, on which he entered, unless he claims the whole. There is a difference between a constructive possession, which it is admitted is in the owner of a survey by act of law, and an actual possession by the owner or his

tenants. In the former case, an intruder shall be deemed to be in possession, not only of what he actually holds, but of what he claims. But in the latter, his possession shall not be carried by construction beyond its actual limits. As to the cases that have occurred in *New York*, their situation may render a peculiar law requisite. There they have no such thing as a title by settlement or improvement. In the present case the defendant had run round the land, and marked his boundaries ten or twelve years before this ejectment. They referred to *Pederick* v. *Searle*, 5 *Serg.* & *Rawle*, 236, and a decision by President HUSTON, at *Huntingdon*, in *January*, 1820, in *Bradford and others* v. *Lane and others*, that if one enter upon a tract surveyed for another, and claim the whole for twenty-one years, it is sufficient to protect him for the whole under the Act of Limitations: and that in such case it is not necessary to make a new survey or designation by marked lines.

In reply it was observed, that as the defendant did not designate his claim by marked lines twenty one years before suit brought, there is no decision to support his claim.

TILGHMAN, C. J. [After stating the points.]—The opinions of the Court of Common Pleas on these three points, are complained of by the plaintiffs. They are, therefore, to be considered by this Court.

1. The plaintiffs say that the effect of *Donnel's* acts and conversations with the defendant was matter of law, and ought not to have been left to the jury. But I do not see how the Court could have decided it. The facts were not sufficiently clear. It did not appear by what authority, or at whose request, *Donnel* entered and made the survey —nor, whether there was an intent to enter, in order to interrupt the defendant's possession. It was decided, in *Ford* v. *Lord Grey*, 6 *Mod.* 44, that it was necessary to prove the entry to have been made *animo clamandi*. Whether it was so made in the present case, or whether *Donnel* was authorised by the plaintiffs to make it, was by no means certain. The Court could not take on itself to decide a doubtful fact; of necessity therefore, it was left to the jury. The same observations will apply to the conversations between *Donnel*

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and the defendant. There was no express recognition of the plaintiffs' title. The defendant talked of going to the plaintiffs or some of them, and purchasing, if they had good title. There was no fact clearly proved, from which the Court could deduce the law.

2. As to the levy and sale by the Sheriff, the plaintiffs have no reason to complain of their being submitted to the jury. From any thing that appears on the record, that point ought to have been decided against the plaintiffs. It does not appear that the Sheriff ever entered. He returned, that he had levied "on 1000 acres of land in *Nippenose* valley, adjoining *Jonathan Walker*." No mention is made of the defendant, nor is the land described by the Sheriff, as being in possession of the defendant, or having been improved by him. It would be too much, to construe such a proceeding to be an entry, sufficient to interrupt the course of the Act of Limitations.

3. The third point is of great importance, but it is not new. If I am not mistaken, it has occurred, and been decided in *this Court*, *in the Courts of several other States*, *and in the Supreme Court of the United States*.. The law of possession is not quite the same in countries long settled and thickly inhabited, and in those where lands in a state of nature are purchased of the Government, very often, with a view of retaining them in an uncultivated state, until they can be vended to advantage, or where the original purchaser, although he wishes to sell, may not find an opportunity for many years. This is the case with what are called our *Back-lands*. The original purchaser pays his money to the Government, has his land ascertained by survey, and pays taxes on it. With regard to such lands, it has been found expedient, to establish it as a principle, that the owner is in *actual possession*, although neither he, nor any one under him, be actually residing on the land. In this situation stood the person under whom the plaintiffs derive title, at the time the defendant entered and began his improvement. The defendant entered *without title*, *or even colour of title*; how then could he take away from the plaintiff, the possession of any more than he actually cultivated, or inclosed? If he took more, how much was it, and what was its limits? There is no ground for a *constructive* possession beyond the bounds

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of the defendant's inclosure. He had no pretence, or colour of title, to the *whole tract surveyed for William Nichols*. If he had claimed that identical tract, by title either of descent or purchase, (although his title turned out bad,) and had entered on part of it, in assertion of his claim, neither the plaintiffs nor any other person under them being on the land, the case would have been very different. But he made no such claim. He set himself down as a settler, although he was in truth a trespasser, and nothing more. For, there is no law or custom of this State, authorising a settlement on land which has been appropriated by survey. But, it is complained of, as a very hard thing, that a man who expends his time and labour on a tract of woodland, should be confined to the limits of his inclosure—nay, that even within these limits, he should be unable to acquire title, by less than twenty-one years possession. This is looking only on one side of the question. Is it not also hard, that a man who has bought and paid for his land, should be deprived of it without consideration? If the settler knows of the prior appropriation, he acts dishonestly, in attempting to acquire title by the Act of Limitations. If he is ignorant of it, he is unfortunate, but his misfortune is owing to his own negligence—for, with proper diligence, he might have known it. Still, I have strong feelings for persons in that situation. The hardship of their case, is entitled to great consideration from the owner of the land, but must not be suffered to shake the principles of the law. Another reason, why a settler should not gain possession *by construction*, beyond the bounds of his inclosure, is, that he is under no obligation to take any definite quantity, nor to lay out his land in any particular shape. In the present case, for instance, the defendant seated himself on the tract surveyed for *William Nichols*. But there were two other tracts adjoining, (in all, 1000 acres.) Now in what direction, was the defendant's possession to diverge from the point where he erected his first cabin and commenced his cultivation? And as he proceeded in his cultivation, what notice had the plaintiffs of the shape in which he intended to lay out his land, or of the quantity he intended to take? Instead of taking the whole of *William Nichols's* tract, he might have taken part of that, and part of one of the others. The more the matter is considered, the

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more are we convinced of the difficulties attending this *constructive possession* contended for by the defendant. These difficulties have induced Courts of Justice to reject it as unjust and inexpedient, as I shall proceed to shew. In *Cluggage* (in error) v. *Duncan's Lessee*, 1 *Serg. & Rawle*, 111, this Court affirmed the opinion of the Court of Common Pleas of *Huntingdon* county, that the Act of Limitations was a bar, as to all land *within the defendant's inclosure, and no more.* In *Burns* (in error) v. *Swift*, 1 *Serg. & Rawle*, 436, this Court was of opinion, "that the law threw upon the plaintiff, the possession of all the land within the bounds of his survey, and when the defendant who claimed under an application founded on an improvement subsequent to the plaintiff's survey, entered and took possession of part, and inclosed it, the possession of the part inclosed was completely adverse and exclusive, so that the plaintiff had no pretence to say it remained in him. But as to the *other part*, the plaintiff was not ousted of his possession, and having the better right, the possession should remain in him although claimed by the defendant." In this case of *Burns* v. *Swift*, the opinion of the Court was delivered by me, and assented to by the late Judge YEATES who was present; and it is of importance to observe, that in that opinion I mentioned, that I understood, C. J. M'KEAN and Judge YEATES had recognised the same principle in decisions at *Nisi Prius.* That the possession of a person who enters without title, shall not be extended by construction beyond the limits of his fences, was laid down by Judge DUNCAN, who delivered the opinion of this Court, in *Hall* v. *Powell*, (*Chambersburg*, *Sept.* Term, 1818,) and by Judge WASHINGTON, who delivered the opinion of the Circuit Court of the *United States* at *Philadelphia*, *April* Term, 1818, in the case of *Potts's Lessee* v. *Gilbert.* When we go out of our own State, we shall find the same principle supported by Courts of the highest reputation and authority. In *Brandt* v. *Ogden*, (Supreme Court of *New York*, 1 *Johns.* 158,) it is said, that in order to bar the plaintiff's recovery, by the Statute of Limitations, the defendant's possession must be "*marked by definite boundaries.*" In *Jackson ex. dem. Hardenberg and wife* v. *Schoonmaker*, (2 *Johns.* 230,) the opinion of the Court was delivered by C. J. KENT, as follows:—"There must be a real and sub-

stantial inclosure, an actual occupancy, or *possessio pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defence, and to countervail a legal title." And to the same effect was the opinion of the General Court of *Maryland* in the case of *Ringgold's Lessee* v. *Cheney*, (4 *Hall's Law Journ.* 128.) In *Davidsons' Lesseee* v. *Baker*, in the Court of Appeals of *Maryland*, (3 *Harr. & M'Henry*, 621,) it was declared by the Court, that "where one claims by possession alone, without shewing any title, he must shew an exclusive adverse possession by *inclosure, and his claim cannot extend beyond his inclosure.*" In *Barr* v. *Gratz*, (4 *Wheat.* 223,) it was held for law by the Supreme Court of the *United States*, that a patent granted for vacant land by the State of *Kentucky*, vested the patentee by operation of law, with a constructive, *actual seisin*, of the whole land contained within the patent; and that a disseisor who enters without title, *is limited to the bounds of his actual occupancy*. From the reason of the thing therefore, strengthened by the force of these concurring authorities, I am of opinion, that the charge of the President of the Court of Common Pleas, was erroneous on the third point, and the judgment should be reversed.

GIBSON, J.—It is a well established principle, both in *England* and in our sister States, that there can be no constructive possession in favour of a wrongdoer; and that a defendant setting up the Statute of Limitations, shall hold no more by it, than what he has had in actual occupancy. In this State, a notion, derived from the peculiar nature of our improvement title, seems to have been entertained, that a wrongdoer entering on unseated land, may acquire a constructive possession of whatever he could hold as an improver, if the land were actually vacant, and, for that purpose, avail himself of the survey of the owner, or establish a boundary of his own; and that he shall, in either case, be considered in the constructive possession of all the land thus included. What reason or justice is there in this? I grant, that as against a third person, the occupant of land, seated on a part of it, clearing, plowing and sowing other parts, and exercising acts of ownership over the rest, like other men in similar circumstances, shall be taken to be in possession of the whole tract,

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as well the wood land, as what is cleared and fenced; and this, so far as to afford him the benefit of protection, under the statutes of forcible entry, even against the *owner:* because, as the title cannot be enquired into in a proceeding on those statutes, the owner having entered by force, must be treated as a trespasser, and the prosecutor as having been rightfully in possession. But the principle is, in no wise, applicable to a case where the occupant defends himself avowedly and exclusively, on the ground of his own wrong; for constructive possession is an incident of ownership, and results only from title. The opposite notion has, as I have said, arisen from a fanciful application of the doctrine of improvement rights, to a possession begun and continued in injury and wrong; but with what shew of reason will readily be seen. From an early period, an improvement on the land has, by the custom of the land office, been a means of acquiring title from the State; and was, at one time actually prescribed by positive law, as a condition precedent to every grant. It was thought good policy to hold out the public lands for sale, on terms that enabled any one who chose to enter and improve, to acquire a right of preemption to a definite quantity, which, as soon as it was ascertained by a survey, became the property, and was considered to be in the rightful possession of the improver, who having closed with the terms of the State, and thus come in under *an implied contract of sale*, acquired an interest attended with all the incidents of property. But this was peculiar to the lands of the State. What right has an intruder to enter on my land, which is not up for sale on any terms, and insist that his trespass shall impart to it, qualities which result only from the inception of a title under an implied contract? If he cannot acquire a direct right to the land by his improvement, how can he, for any purpose, assume the character of an improver, and, by qualities peculiar to it, affect my title through the Statute of Limitations. The truth is, that the statute was never intended as a means of acquiring title, or as an encouragement to people to enter on each others land with a view to hold it; but to compel them to decide their controversies while transactions are recent and the evidence of them is attainable: and there its operation in protecting a possession under a bad title, or no title at all, is but a *conse-*

quence of the object of its enactment, and not the object itself. Why then should a trespasser be so far favoured as to enable him, by construction, to extend his possession beyond the immediate subject of the trespass? Negligence in prosecuting, cannot be imputed to the owner, except as to the very part withheld from him; for I do not know that there is such a thing as a constructive disseisin in favour of the *disseisor*, although the disseisee may sometimes elect to consider himself disseised or not at his option. If the operation of a trespass may be enlarged by construction, how far may it extend? A number of warrants are sometimes laid together by an outline without running the dividing lines:—would an intruder gain possession of all the land included; or of how much? In answer to this, I have heard it said he could acquire the possession of no more than if the land were vacant: and thus we always find the argument recurring to the doctrine of improvement. What hardship is there in refusing to permit an intruder on appropriated land, who cannot acquire a right to the soil, to acquire the incidents of such a right? It has been said that as the whole territory at first belonged to the State, which necessarily is the source of all title, and that as there is still a considerable portion of vacant land which may be acquired by improvement, a settler has a right to treat all land as vacant, while the title of the owner is not asserted by acts of ownership, but is suffered to remain dormant. I cannot see the justice of that; the owner is bound by no moral obligation to use his property in a particular way, or at all; and as to ignorance of prior appropriation, it is only requisite to answer, that if the evidence of survey be notice to prevent a settler from acquiring title by direct means, it ought to be sufficient to preclude him acquiring it indirectly. If, when the owner of an office title has done every act which the law deems to be of sufficient notoriety to apprise subsequent applicants or settlers that the land is appropriated, enough has still not been done, the fault is in the law and not in the man; and therefore a settler entering, even by mistake, ought not to complain that he who is in *no* default, is not compelled to bear the *whole* loss, when he himself might, by a little more than ordinary circumspection, have avoided the loss altogether. But where the owner resides on a part of the tract, although the danger of misap-

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prehension may be less, the principles of law are precisely the same. The owner of unseated land has a constructive possession which can be divested only by an actual possession inconsistent with it, and where the owner is in actual possession of a part, he has no more than constructive possession of the rest. Now the reason of a rule universally established and acquiesced in, that where both parties live on the land, there is a mixed possession of whatever is not exclusively occupied by either, which shall be esteemed that of him who has the right, is, that such mixed possession is only constructive as it relates to either party, and of no higher grade than that which it would otherwise displace. As, therefore, there is the same constructive possession of the part not actually occupied by either party, whether the owner reside on a part of the land or not, his being entirely out of actual possession is a circumstance that can have no operation against him. The matter then stands precisely on the grounds of an interference of surveys, where it is conceded the second survey will not divest the constructive possession gained by the first. But it is contended that where the party setting up the statute resides on the portion of the land included by the interfering lines, he shall be taken to be in the actual possession of the whole of it. If, however, he can acquire constructive possession neither by an adverse survey, nor by residence on a part, I cannot discover how he may acquire it by any peculiar operation of both together. The principle that there is no constructive possession against the owner is universal and applicable to all cases. The very point has never before been formally decided by this Court; but an opinion in favour of the principle now established has, more than once, been intimated.

On the other hand, as there can be no constructive possession in favour of the trespasser, his actual possession, can be divested only by an entry into the part occupied by him; for an entry into the rest would be an occupancy of what was sufficiently in the owner's possession before. Where indeed there is *no* actual possession in any one, but the freehold, although of several distinct parcels, is by law in him that enters, an entry into parcel, vests the possession of the whole. *Co. Lit.* 15 b. But, where there is an actual adverse possession, the governing principle seems to be, that there must be

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an entry into the freehold of each several disseisor; as where the seisin acquired by ousters committed by a number is several, and respectively confined to the portions acquired by each; or where there is but one disseisor who lets a part for life, an entry into parcel will not be an entry into the whole; although in the last case it would be different if the lease were only for years; for there would still be but one tenant of the freehold. *Vin. Entry B. pl.* 1. 6. 21. *Co. Lit.* 252 b. Where, therefore, there is an actual possession of a part, a survey of the whole will not *necessarily* be an entry to divest such possession; because the acts of ownership thus exercised under a claim of right, may take place on what was in possession of the owner before; but if in making the survey he necessarily passes over and exercises acts of ownership on the smallest portion of what is in possession of the wrongdoer, I have no difficulty in saying it will be a good entry to avoid the Statute of Limitations as to the whole. As to every other part of the case, I fully concur with what has already been said.

DUNCAN J.—This case and several others, depending on the Act of Limitations, have laid over, to give the Court an opportunity of conferring and giving a construction to an Act, out of which so many important questions have grown. I had been consulted on this title, and will avoid giving an opinion on the merits of the conflicting claims, and confine myself to one abstract question of law, and consider, "how far the Act protects one who has entered on a tract of land duly surveyed, and has resided within the lines of the survey more than twenty-one years, against the rightful owner." Had there been a difference of opinion between the Judges who have just delivered the judgment, I would not consider myself at liberty to give an opinion, that would turn the scale; but as they agree, and it is very desirable that the question should be considered in a full Court, I have yielded to the wishes of the Chief Justice, and my brother GIBSON, in expressing my sentiments.

While at the bar, I have looked forward to the time, when this question would become one of great and serious importance, and had considered it with some care; and since, with the most anxious attention. It has been attempted to involve it with the right of settlement. This right rests on a

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solid foundation, not now to be shaken; and is to be traced to a very early period of the province. Whatever may have been the moving consideration with the proprietaries, it is certain, that they gave a preference to settlers on their unappropriated lands. This usage grew into a right of preemption, recognised by them, and by their officers, and was sanctioned by many judicial decisions, prior to the revolution. This usage was well understood, and has been defined by positive law. But neither the usage, nor the law, gave any sanction to an entry into lands which had before been disposed of. The lands which were open to settlement, were vacant, unappropriated lands. After appropriation, neither the proprietaries, nor the State, had power to dispose of them again. Where there had been a previous disposition, the settler could gain no right of preemption. No one could claim a preemption right to that, which had already been sold. The man who has obtained a legal survey, has not only acquired a right to, but possession of, all the lands within his survey; for it is a principle of the common law, that the possession and the right go together. The owner is never deemed out of possession, until another has obtained an adverse possession, where the possession is vacant. Trespass, which is a possessory action, will lie against a wrong doer; it is the close of him who has the right, *Chitt. Plead.* 74. This principle of the common law prevails in all the States of the Union, where the question has been agitated. In *New York* it has often been decided, that trespass will lie by the owner against the intruder into wild and uncultivated lands. 3 *Johns.* 265. 9 *Johns.* 315. 11 *Johns.* 385. 12 *Johns.* 184. 15 *Johns.* 118. And in *Massachussets*, *Proprietaries of Kennebeck* v. *Call*, a survey was held to give the owner such possession as would support the action of trespass, though he may elect to be disseised, 6 *Mass.* 484, and bring his ejectment; yet the act of entry does not amount to a disseisin. And in this State, in *Burns* v. *Swift*, 2 *Serg. & Rawle*, 436, it was determined, that the law casts the possession on the owner of a survey returned, of all the land contained within it.

Seisin and possession continue in the owner, until he is disseised; and no farther is the possession lost, than of that of which he is actually disseised. This is a doctrine of law

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familiar to those acquainted with its first rudiments. Possession and the right are preserved together. The rightful owner, in presumption of law, is in the constant possession, until that possession is adversely interrupted and exclusively possessed by another. A wrongful possession cannot be extended by construction; constructive possession always accompanies the right. It is a contradiction in terms, that a man by wrong, should have any right, and that this right, by wrong should be extended by construction. There cannot be two conflicting constructive possessions, one in the owner and the other in the trespasser. The right always draws to it the possession, and it there remains, until seised by the wrong doer, whose possession is strictly *possessio pedis*; who must necessarily be confined to what he has grasped, his real and actual possession. Beyond that, no length of time will protect him; because beyond that, the owner's possession has never been changed; it always is, in contemplation of law, continued in him. These are the dictates of common sense, of common justice, and of the common law. Did they need authority to support them, authorities abound in the decision of the Courts of the several States, and of the Supreme Court of the *United States*. In *New York*, I refer to 1 *Johns.* 150. 2 *Johns.* 230. 8 *Johns.* 263. 9 *Johns.* 381. 11 *Johns.* 385. 12 *Johns.* 184. 16 *Johns.* 293. In *Connecticut* to 2 *Day*, 498. In *Massachussets*, to 1 *Mass*, 483. 4 *Mass.* 416; in the first of which cases, the Court unanimously declared, "that in order to divest the owner of that possession, which the law had cast upon him, there must be an actual occupation, to the exclusion of the rightful owner; and that to extend the principle relative to adverse possession, beyond the case of an actual, visible, and consequently exclusive possession, would be of the most dangerous consequence, and authorise trespasses by law." In *Maryland*, to *Ringgold's Lessee* v. *Cheney*, 4 *Hall's Law Journal*, 128, and to *Davidson's Lessee* v. *Beatty*, 3 *Harris & M'Henry*, 625; where the law is distinctly laid down, that where a person claims by possession only, without shewing any title, he must shew an exclusive adverse possession by inclosure, and his claim cannot extend beyond his inclosure. In *Virginia*, to *Clay* v. *White*, 1 *Munf.* 73; where the patent was held to be the symbol of possession, and any person entering into that posses-

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sion, must be a trespasser; for the patent, *ipso facto*, confers seisin, because, as was said by Judge TUCKER, it is founded on an actual survey of the land; and Judge ROANE gives a number of instances, where livery of seisin is dispensed with, and actual corporeal possession, on the ground that acts of equal notoriety ought to have an equal and similar effect; and observes that the reason holds strongly in a new country, where proof of actual possession might be difficult, and where in some sense, a corporeal investiture has already been made by the entry and survey. In *South Carolina*, to *Rochel* v. *Holmes*, 2 *Bay*, 425; where it is said, that adverse possession is never presumed to defeat a grant; it must be actually proved and shewn to rebut a prior title, in the same manner and degree of precision, as the plaintiff must shew a clear title in him, before he can recover. The same principle was enforced in the Circuit Court of the *United States*, for this district, in *Pott's Lessee* v. *Gilbert*, 1 *Peters's Reports*. In this State, to *Cluggage* v. *the Lessee of Duncan*, 1 *Serg. & Rawle*, 111. The opinion of the Court below, was, that the Act was a bar to all lands included within fence and no more. This Court pronounced that opinion to be right, the CHIEF JUSTICE observing that *Cluggage* had no survey, and therefore there was nothing to which he could refer, but his inclosure. And lastly, to the decisions of the Supreme Court of the *United States*, in *Green* v. *Little and another*, 8 *Cranch*, 280. It was there held, that seisin may either be by a *possessio pedis*, or by construction of law. The constructive seisin indeed, is sufficient for all the purposes of action or legal intendment; and Mr. Justice STORY in giving the opinion of the Court, says, "we are entirely satisfied, that a conveyance of wild land, gives a constructive seisin in deed to the grantee, and attaches to him all the legal remedies of the estate;" and going on to another question, put by the Court below, observes, that "the first patentee had the better legal title, and his seisin presently, by virtue of the patent, gave him the best right to the whole land; *a fortiori*, he must have the best right to the land not included in the actual close of the second patentee; for by construction of law, he has the eldest seisin, as well as the eldestpatent." And in *Barr* v. *Gratz's heirs*, 4 *Wheat.* 213, the clear and broad principle is established, that when an entry is made without title, the dis-

seisin is limited to the actual occupancy, and that a patent issued for vacant land, by operation of law, vests the constructive, actual possession of the whole in the patentee, and consequently, so far as actual adverse occupation extended, did the statute run, and no farther. It follows that an adverse possession is always negatived, where the party claiming title has never, in contemplation of law, been out of possession, *Adams's Eject.* 47: that there must be a disseisin, and that strictly proved, for the statute never runs against a man, until he is actually ousted. *Runn. Eject.* 61. If these are the doctrines of law, the right conferred by twenty-one years possession, where the entry is without colour of title, which every entry into lands duly surveyed is, must not only be adverse, but marked by definite boundaries: an actual occupancy; a real inclosure; definite and positive; notorious and exclusive. The question is free from all embarrassment on the ground of right by settlement. The misconception has arisen from confounding this right with the extent of possession. The inquiry is not on the right of the parties. The defence on limitation, supposes the absence of right in the parties setting it up. One who has no settlement right, has nothing but a naked possession. For he who enters on the appropriated land of another, enters without colour of title, as much as if he had entered into an unoccupied house, or an uninclosed city lot. The law knows no difference. Courts can make no distinction. The surveyed lands of a man, situated upon the *Susquehanna*, are held by the same tenure, secured by the same laws, as lots in the city of *Philadelphia;* the rights are the same, whether the possession be rural or urban; on the *Delaware*, or on the *Alleghany*.

Against this uniform train of decisions of our own Courts, the highest tribunals of justice in the several States, and of the Supreme Court of the *United States*, there cannot be found one solitary decision. It would be a harsh construction of a statute made for quieting possession, where the evidence of title might, from lapse of time, be out of the power of the possessor, and not for the encouragment of intrusion, to extend its protection beyond the actual possession, where the entry is without colour of title.

If this were not the law, a trespasser by entering and cutting down a few logs for a cabin, would acquire the posses-

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sion of many hundred acres—nay, more, by the bare commission of a trespass, on a corner of several adjoining tracts of unoccupied land, would gain the possession of 400 acres, his choice of the whole.

We can easily understand, what is meant by colour of title. There may be, there too often are, several office rights for the same tract of land. The holder of the younger enters; this is under colour of title. So several may claim title under the same original grant. All these enter under colour of title, and the difference is this; "*where one enters under colour of title, his possession is co-extensive with his title; but where one enters without any colour of title, his seisin is confined to his actual possession.*" Judges of high character have, I know, entertained contrary opinions, and have decided that no length of time will give a right to him who enters without colour of title. But on much reflection my own judgment is satisfied, that a possession so taken and continued for twenty-one years, by actual occupation and inclosure, will bar the entry of the rightful owner, and confer a right on the possessor, subject to the rights of the State for the purchase money; but that such possession is not by construction to be extended to other lands, part of the same survey; because the owner of the survey in contemplation of law, remains in the possession of every part that he is not actually excluded from by the occupation of another.

There is no solid reason to support the position, "that one entering without colour of title on a surveyed tract in order to define his possession, can resort to the limits and bounds of the tract on which he has settled." See Judge WASHINGTON's opinion, *Potts's Lessee* v. *Gilbert.* His entry has no connection with these lines, the existence of which gives him notice that the land was not vacant. The constructive possession by the lines of a survey is, where the party claims title in virtue of such lines, and this title forms his right or colour of title. But where one enters disclaiming these lines, treating them as forming no evidence of title in any one, and enters into the possession as of vacant unsurveyed lands, he cannot adopt them for the purpose of stretching his possession, while he disavows all claim under them. These lines give him notice that the land is not vacant. He enters with full knowledge that he can acquire nothing by settlement right.

He may fix his eyes on the lines of another; he may set his heart upon the whole tract; but nothing can make it his, but purchase from the owner, or an actual occupation by inclosure for twenty-one years of all circumscribed within the lines: for the owner, in contemplation of law, and for every legal purpose, continues in the possession of every part not so occupied and inclosed.

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Judgment reversed and a *venire facias de novo* awarded.

COLLINS and others *against* RUSH.

IN ERROR.

June.

ERROR to the Court of Common Pleas of *Lycoming* county, in which a bill of exceptions was returned to the answers of the Court to certain questions.

The construction of any written instrument is the exclusive province of the Court, but the description of the land conveyed, its limits and contents are often mixed questions of law and fact.

The suit was ejectment brought to *September* Term, by *Moses Rush* against *Rhoda Isaac* and *William Collins*, to recover four hundred acres of land in *Lycoming* county. The plaintiff claimed by deed of assignment to him, in *July*, 1815, from *Mary Reed*, to whom a warrant was granted on the 22d *September*, 1792, and a survey was made thereon, on the 23d *November*, 1793. The defendants claimed by improvement, and also set up a possession under the Statute of Limitations. A warrant was given in evidence, granted to *William Collins* and *Samuel Carpenter* in 1795, on which a survey was made, excluding the land in question: but the defendants contended that these were the acts of *Carpenter*, without the knowledge or consent of *Collins*. The facts of the case, did not appear otherwise, than as they were stated in the opi-

The plaintiffs in error cannot complain of erroneous answers of the Court if in their favour.

After an award in favour of the defendants in a former ejectment, any delay in bringing a new ejectment short of the period allowed by the Statute of Limitations, will not of itself authorise the jury in such second ejectment to annex a condition to their verdict for the plaintiff, that he shall pay the defendant a certain sum for his improvements made since the award.

And if such verdict be given, the Court on error brought by the defendant below, will reverse the judgment entered upon it.

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nion of the President of the Court below, filed at the request of the defendants, agreeably to the Act of Assembly. This opinion stated that the question, what title *Moses Rush* could acquire under the deed of assignment to him, was a question of law, for the decision of the Court, and the Court were of opinion, that *Moses Rush*, by this deed of assignment to him, acquired a legal title to all the estate before owned by *Mary Reed*. And if any equity under the circumstances, upon a recovery by *Rush*, could be claimed by *Mary Lee*, (late *Mary Reed*,) the defendants have nothing to do with that. Her selling to *Moses Rush*, subject to any interference or incumbrances, is placing the risk of the law suit upon *Rush*, and whether he succeeds or not, she must be paid the purchase money. The opinion further stated, that the defendants had given in evidence, a record of a suit of *Mordecai Lee*, and *Mary* his wife late *Mary Reed* against *William Collins*, which was referred and an award made in favour of *William Collins*, to certain lines marked on a diagram filed. This award was made upon the 4th *May*, 1808. "It has been contended by the counsel for the defendants, that *Mary Lee* late *Mary Reed*, having acquiesced in this report till *September*, 1815, the time this ejectment was commenced, and that in the mean time, the defendants having made considerable improvements upon the land in dispute, the plaintiff ought not now to recover. It is in evidence that *Mary Lee* lived in *Berks* county, and there is no evidence that she knew of the improvements progressing. But *Samuel Carpenter*, who acted as her agent, lived in the neighbourhood. Under these circumstances, there may be some equity in favour of the defendants. To bar the right of the plaintiff requires two judgments. One award, and one judgment upon it, is not sufficient. The award cannot be considered as of more validity than the verdict of a jury, and two verdicts, and judgments upon them, are necessary to bar the plaintiff from another action."

The defendants prayed the Court to instruct the jury

1st. That if they believe that *William Collins*, when he settled, claimed four hundred acres, and has continued that possession adverse to the plaintiff for twenty-one years and upwards, before this ejectment brought, the defendants have a

right to hold that quantity, and the plaintiff is not entitled to recover. 1821. *Sunbury.*

2d. That if a person settles adversely, and continues in possession for twenty-one years and upwards, and claims all along four hundred acres, he is entitled to hold that quantity, although he had no survey made until the year 1809; if the jury are satisfied the land he now claims, was the same he intended to claim, when he first settled, and what he always continued to claim, and had surveyed seven years before the ejectment brought. COLLINS and others v. RUSH.

3d. That if the jury believe *Mary Reed* only conveyed, and intended to convey the land outside the claim of the defendants, and that that was the only land the plaintiff purchased, then the plaintiff is not entitled to recover.

4th. That if they believe, the warrant to *Carpenter* and *Collins* was taken out by *Carpenter*, without the knowledge or consent of *Collins*, and that he protested against that survey, and refused to acquiesce therein, and continued in possession without any regard to it, he is not bound by that warrant or survey.

5th. That an improver finding a survey interfering with a part of his claim, if he purchases the survey to quiet the title to that part, it will not preclude him from holding the other part of his claim by improvement.

Answers of the Court.—The Court answer in the affirmative, that if defendants or those under whom they claim, have had twenty-one years adverse possession before this ejectment brought, the plaintiff cannot recover.

2. To this point the Court answer in the affirmative. If the jury believe the statement supported by the evidence in the cause.

3. By *Mary Lee's* assignment, a legal title is conveyed to *Moses Rush*, the plaintiff, to the full extent of *Mary Lee's*, formerly *Mary Reed's*, survey.

4. If the jury believe that this statement of facts, is supported by the evidence in the cause, *Collins* would not be bound by the warrant and survey.

5. It will not preclude him holding the other part of his claim by improvement, unless he has already acquired to the full extent of his improvement right.

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Upon one of the jurymen enquiring of the Court at the conclusion of the charge, whether the jury could allow to the defendants any thing for their improvements made since the reference, and before this action brought, the Court answered, that if the jury believe that there has been an unreasonable delay in bringing this ejectment after the decision by reference, and in the mean time, the defendants have made valuable improvements, it would give them such an equity that the jury may allow a reasonable sum for those improvements, if they are satisfied that the land is increased in value by the labour of the defendants.

The following verdict was given by the jury. "The jurors in the above cause find for the plaintiff. The plaintiff to pay the defendants 300 dollars for the improvements made on the land between the time of the arbitrators making the report (by an apparent acquiescence therein) and the time of bringing this ejectment. The 300 dollars to be paid before any writ issues to dispossess them."

Burnside, for the plaintiffs in error, contended,

1. That the Court ought to have submitted to the decision of the jury the intention of *Mary Reed* in her assignment to the plaintiff.

2. The Court did not answer the 1st, 2d, and 4th questions.

3. The answer of the Court to the question of the juror was obviously erroneous, and the jury had no right to give the defendants an indemnity for them. It is true it may be said that the charge was in this respect favourable to the defendants, and therefore we cannot assign it for error. But the fact is not so. The jury were probably induced to give a verdict against the defendants on the presumption that they would be paid for their improvements. If the plaintiff had a good title, he ought to have recovered without being compelled to pay any thing. If his title was bad, he ought not to have recovered. Nor is it an objection in point of law that we assign for error a decision in our favour. 2 *Cranch*, 126. If the error be the fault of the Court, the party who has advantage by it, may assign it for error. 2 *Bac. Ab. Tit. Error.*

Campbell, for the defendant in error, was relieved by the Court from speaking to the first error assigned.

2. He contended, that the first, second and fourth questions were all answered.

2. The question of the juror was irrelevant to the issue joined, which was only as to the title to the land; and as to that, the verdict is complete. If the charge is correct so far as concerns the issue tried, the judgment cannot be reversed, because it is incorrect on other points not material to the issue. *Numan* v. *Kap*, 5 *Binn.* 73. It is not error, if an erroneous opinion is given on an abstract point not arising out of the evidence. *Deal* v. *M'Cormick*, 3 *Serg. & Rawle*, 343. Besides, this Court may affirm the judgment as to the recovery of the land, and reverse it as to the residue. In dower, a judgment erroneous as to the damages may be reversed as to that, and remain as to the land. 2 *Bac. Ab.* (*Wils. Ed.*) 501.

Reply.—The question proposed by the juror was very material. The defendants probably lost the land by it, and were to get only 300 dollars as a recompense. It would be extremely unjust to reverse the judgment as to the damages, and affirm it as to the rest.

DUNCAN, J. delivered the opinion of the Court.

This case is brought up in a very nude state, and affords another instance of the evils flowing from the Act requiring Courts of Justice to reduce their opinions to writing and file them of record in the cause. This course is now unfortunately pursued, instead of the bill of exceptions, for which it is a most miserable substitute. Cases are now brought up without the facts; questions are frequently multiplied on questions, which do not call the attention of the Court to any precise state of facts,—requiring the opinion of the Court under the circumstances of the case, without stating what the circumstances are, or how the questions arose from the evidence, or are pertinent to the issue. This provision, as experience, the best test and instructor convinces us, though in theory it looked well, yet in practice, like many other beautiful theories of government and law, works badly; and I

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now acknowledge I am as desirous to see it expunged from the Statute-book, as I was anxious to see it there.

The errors assigned and insisted on, are three:

1. The answer to the third question. On which the plaintiffs in error required the opinion of the Court.

2. In the answer to the first, second, and fourth points made by them on the trial. Which they complain of, as not containing full and fair answers.

3. The answer of the Court to the inquiries made by one of the jurors at the conclusion of the charge.

The construction of every written instrument is the exclusive province of the Court, but the description of the land conveyed by any deed, its limits and contents, are often mixed questions of law and fact. Here there is no patent ambiguity in the assignment, requiring the aid of extraneous evidence to ascertain the extent or fix the boundaries of the grant. The description can give all certainty. It was all the land within *Mary Lee's* survey and patent, a grant by metes and bounds. The construction put on it by the Court was the true and accurate one; for *Moses Rush* did acquire the interest of *Mary Lee* in all lands within the survey and patent, taking on himself the risk of all interferences or incumbrances;—that is, he bought subject to them.

Whatever just complaints the defendant in error might have against the answers of the Court on the first, second, and fourth points, the plaintiffs complain most ungraciously; for they are all in their favour. They contain an assent directly and affirmatively to their propositions. What could they ask or expect more?

But the eighth exception is one of the utmost importance. Upon one of the jurors enquiring of the Court, at the conclusion of the charge, whether the jury could allow to the *Collins's* any thing for the improvements since the reference and before the action brought, the Court answered, that if the jury believed there was an unreasonable delay in bringing the ejectment after the decision and reference, and in the mean time the defendants had made valuable improvements, it would give them such an equity, that the jury might allow a reasonable sum for the improvements, if they were satisfied the land was increased in value by the labour of the defen-

dants. At first, I could not see how the plaintiffs in error (the defendants below) could complain of this. It was apparently for their benefit, and if it was a matter altogether irrelevant, a mere surplusage in the verdict, it might be rejected, and judgment entered generally that the plaintiff below should recover possession of the land. This was my first impression; but, on examining the record produced, it appears, the finding of the jury was a special one. "The jurors in the above cause find for the plaintiff; the plaintiff to pay the defendants three hundred dollars for the improvements made on the land between the time of the arbitrators making the report *(by an apparent acquiescence therein)* and the time of bringing the ejectment; the three hundred dollars to be paid the defendants before any writ issues to dispossess them." It is therefore manifest, that this consideration formed the ground-work of their verdict,—entered into its very essence. It is but one judgment—nothing distinct —or capable of division—where part may be affirmed and part reversed, on the ground that *utile per inutile non viteatur*.

The Court in their answer were taken by surprise; the point had not been argued by the counsel; and in the close of not a very short charge it was suddenly sprung upon them, and instantly answered, without turning it in their minds, or deliberating upon it, as they would have done, had their attention been drawn to it by the course of the argument; and this will account for the palpable error into which the Court fell. The plaintiff had shewn a legal title. The Court were of opinion that the report of the referees, in a former action was not *per se* conclusive on his right; but the acquiescence and the subsequent improvements were another question. These might be attended with such circumstances, a lying by, and ensnaring the defendants into an opinion that their opponent was satisfied with the decision which the referees had made, encouraging him to go on for years with valuable improvements under the eye and with the connivance of the party,—as would call for the interposition of a Court of chancery by injunction, to prevent the plaintiff from recovering. Not having the testimony before us, we can give no

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Moses Rush, were such as would entitle the plaintiffs in error to seek relief; but the Court of Common Pleas, who had all the evidence before them, should in answer to the juror's inquiries, have instructed them whether they were so or not. But nothing could be more erroneous, nothing more pregnant with mischief, more inconsistent with all our sense of the rights of property, or with the unconditional grant made by the State, than to leave it to the jury, as here was done, to say whether the delay was unreasonable, and if they believed it was, that then they could make the plaintiff pay smart money. The Court in fact say, "it is true the plaintiff has a legal right; he is not barred by any positive limitation; he has not, by an acquiescence in the report of the referees or by encouragement to the defendants prejudiced their title in equity; but if you believe his delay in bringing the ejectment is unreasonable, and if you believe that the value of the lands is increased by the improvements, then you may allow the defendants a reasonable sum for them." This is improving a man out of his land with a witness. Delay alone, short of the time allowed by law to every one to prosecute his claim, forms no bar. The man, whose legal title is affected by time, loses it. The law extinguishes it. But until that period runs round, it remains his, though covered with the most costly edifices or most expensive improvements, without the payment of any redemption money. It does not stand mortgaged, the trespasser has no lien; for then there can be no line drawn. The law in its wisdom has fixed the time: it will not leave it to the discretion of any men. The limitation of time is legislative enactment not judicial discretion. There can be no terms made; no line drawn. The jury can make no bargain for the parties. They are to decide on the rights of the parties according to the laws of the land. They cannot make a plaintiff pay for his own land, or a defendant surrender up his possession, if he has a right to retain it, on receiving such pecuniary compensation for his labour as they may think fit to allow him. This would be the exercise of an arbitrary discretion, the law of tyrants, the *jus vagum*, the most miserable of servitudes, as it would have no certain rule for its government. It would be an invitation to intrusion, a reward and bounty to trespassers. When the law has fixed the

time in which the non-prosecution of a right shall operate as a forfeiture, Courts and juries cannot circumscribe it. This would be *jus dare* and not *jus dicere*,—an assumption of legislative power. All attempts to obtain a law for the purpose have proved abortive. They have been wisely and firmly resisted by the Legislature, as violating the rights of property, and repugnant to the Constitution. And sure I am, the respectable Court by whom this error was made, on reflection would be the first to acknowledge their error, and now to answer, there can be no such compromise of men's rights against their will. The plaintiff had a right to stand on his title;—the defendants on their title and possession. The plaintiff in his writ complained that the defendants were in the actual possession of this tract of land, the right of possession and title to which he averred was in him, and that he was prepared to prove it. The defendants denied his right, and on this they joined issue. This issue the jury were sworn to try. How then could the jury, on this issue, find the right to be in the plaintiff, and yet make it a condition on which the restoration of that right is to depend, that he shall pay the trespasser for his trespass? Or how on the other hand could they say, there were such acts done by the plaintiff, such acquiescence in the decision of judges of the parties' own choice, such encouragement given to the defendants to continue their improvements, as in equity, affect the conscience of the plaintiff, and prejudice his right, so as to render it against conscience for him to disturb the possession of the defendants, but still they shall deliver up the possession for such a price as the jury think fit to allow them. If the defendants made out any case for relief, it was for the land itself, and not compensation in money for their labour. If they made out no case, the plaintiff was entitled to an unconditional verdict.—In either way, the answer was wrong, and misled the jury.

There are many cases in ejectment, where conditional verdicts have been recommended by the Court, in matters of trust and executory contracts. There being no Court of chancery in this State, the Courts of law, lest there should be a failure of justice, exercise chancery power, taking the rules of chancery for their guides. They, by the medium of a jury and conditional verdict, compel indirectly what chan-

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cery decrees directly—the specific execution of contracts, the performance of trusts. But no Court of chancery could restrain the legal owner of lands from recovering the possession from one who had acted against his will, until he had paid the trespasser for such improvements as it pleased him to make against the will of the owner, when he had kept him in law and exposed him to expense in the recovery of his just rights.

There is no such defence at law, and it is opposed to every principle of morality, justice, and equity.

Judgment reversed, and a *venire facias de novo* awarded.

FOSTER and another *against* SHAW and another.

June.

IN ERROR.

A letter dated 24th June, 1773, from a confidential clerk in the land office to the plaintiff's ancestor shewing title in the latter accompanied with the original application and memorandum filed in the office and afterwards ratified by the covenants of the parties, is evidence in favour of the plaintiff.

ERROR to the Court of Common Pleas of *Union* county, in an ejectment brought by *John Foster* and *William Foster*, against *Samuel Shaw* and *Thomas Matthews*, in which there was a verdict and judgment for the defendants in the Court below.

The suit was brought for a moiety of 214 acres and 35 perches in *Hartley* township. The warrant under which

Where the plaintiff's father owning a moiety of a tract of land devised the tract to the plaintiff and directed that the other moiety the property of A, should be purchased at the expense of his other son J., in a suit for the moiety against persons claiming under A., a forged deed from A, to J., of all A's right to the tract, no participation being shewn by the plaintiff's in the fraud, is not evidence for the defendant.

The Board of Property has no authority to vacate a patent, and their minutes of *ex parte* proceedings for such purpose are not evidence of any thing.

The record of the Supreme Court of a suit between other parties, is evidence on behalf of the defendant as introductory to evidence to prove that a witness who was examined on the trial of that suit, and whose credit is impeached, gave the same evidence he had given in this suit.

But the notes of the Judge who tried the cause are not evidence to shew what a witness swore for any purpose whatever.

A deed proved by one of the subscribing witnesses to have been executed in Ireland and certified by the sovereign of Belfast under the seal of the corporation, is not evidence without proof that the seal is the seal of the corporation.

both parties claimed, issued from the land office on the 27th *June*, 1773, in favour of *Robert Chancellor*, and a survey was made thereon on the 15th *February*, 1793. The plaintiffs claimed the moiety under the will of their father *John Foster*, who as they alleged took up the lands, and agreed with *Chancellor* that he should take out the warrant in his name, and that *Foster* should have one-half for locating the lands, as was a very common course at that period. The defendants claimed the whole under a conveyance of the 15th *April*, 1796, from *Robert Morrison* devisee of *Robert Chancellor* to *Thomas Matthews*.

The plaintiffs gave in evidence articles of agreement, dated the 7th *August*, 1773, between *Robert Chancellor* and *John Foster*, by which it was covenanted that *Foster* should have one-half the tract for locating it, and *Chancellor* the other half for taking out the warrant and surveying it, and then gave in evidence the will of *John Foster*, dated the 10th *February*, 1786, by which he devised this tract to the plaintiff, and directed, "that part of said tract, that is the property of *Robert Chancellor*, I allow to be purchased at the expense of my son *James*," and devised other lands, to *James*.

The plaintiffs then offered in evidence a letter of the 24th *June*, 1773, from *David Kennedy* who was then a confidential clerk in the office of the secretary of the land office, to *John Foster* in which he states, "that it did not suit him to advance the money on his location, adjoining *Glover's*, but had given it to the bearer *Robert Chancellor*, who had taken out a warrant for it, and given an agreement to convey to *Foster* one-half;" having first given in evidence the original application, taken from the file in the secretary's office, and proved to be in the hand writing of *John Foster*, except that *John Foster's* name was scored, and *Robert Chancellor's* substituted by an interlineation, which was in the hand writing of *David Kennedy*. At the foot of this application there was a note, in the hand writing of *David Kennedy*, signed *D. K.*, in these words; "*John Foster* sent down to take out a warrant for the half; but it did not suit me to advance the money; I gave it to the above young man." This letter was objected

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to by the defendants, and rejected by the Court, and an exception taken by the plaintiffs.

The defendants offered to give in evidence, an exemplification of a deed poll, dated the 18th *December*, 1792, from *Robert Chancellor* to *James Foster*, purporting to be a conveyance to *James Foster* in fee of the whole right, title, and interest of *Chancellor* in the warrant. This was not offered as a genuine deed, but admitted to be fabricated. The plaintiffs excepted to this evidence, but the Court admitted it, and the plaintiffs took another exception.

The defendants also offered in evidence the proceedings, and order of the Board of Property, on the petition of *Thomas Matthews*. To this evidence the plaintiffs objected, but the Court admitted it, and sealed another bill of exceptions.

The defendants also offered in evidence the record of the Supreme Court, of a trial and verdict, in a suit brought by *Morrison's Lessee*, against *James Foster and another*, in 1795, as introductory to other evidence, which he meant to produce, to prove that a witness who was examined on his behalf on this trial, gave the same evidence on that occasion, which he gave on this; the plaintiffs having examined witnesses to impeach his credit, by proof of inconsistent statements made by him. This evidence was also objected to by the plaintiffs, and admitted by the Court, who sealed a bill of exceptions.

The defendants thereupon offered in evidence, the notes taken by Judge YEATES, who sat on the trial, of the testimony given by the witness before mentioned, after proving by one of the jury, that the witness was sworn on the former trial. This evidence was objected to by the plaintiffs, but the Court admitted it, and sealed another bill of exceptions.

The defendants also offered in evidence, a deed dated the 1st *April*, 1796, from *Robert Morrison* to *Thomas Matthews*, proved by one of the subscribing witnesses to have been executed in *Ireland*, and certified by the sovereign of *Belfast* under the seal of the corporation. The deed was ob-

jected to by the plaintiffs, but the Court admitted it, and another exception was taken.

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The opinion of the Court was delivered by

DUNCAN J.—The warrant which gave rise to the controversy, issued from the land office, on 27th *June*, 1773, in the name of *Robert Chancellor*.

The plaintiffs claim an undivided half part of the land surveyed on it, under the will of their father, *John Foster*, who they allege took up the land, and agreed with *Chancellor* that he should take out the warrant in his name, and that *Foster* should have one-half for locating the lands; a very common custom at that day.

The defendants claim the whole under a conveyance of 15th *April*, 1796, from *Robert Morrison* devisee of *Robert Chancellor* to *Thomas Matthews*.

The plaintiffs gave in evidence articles of agreement of 7th *August*, 1773, between *Robert Chancellor* and *John Foster*, by which it was covenanted that *Foster* should have one-half the tract for locating it, and *Chancellor* the other half for taking out the warrant and surveying it. And they gave in evidence the will of *John Foster*, dated 10th *February*, 1786, by which he devised this tract to the plaintiffs, and directs "that part of said tract that is the property of *Robert Chancellor*, I allow to be purchased at the expense of my son *James*," to whom he devised other lands.

They then offered in evidence, a letter of 24th *June*, 1773, from *David Kennedy*, a confidential clerk of the secretary of the land office, to *John Foster*, in which he states "that it did not suit him to advance the money on his location adjoining *Glover's*, but had given it to the bearer, *Robert Chancellor*, who had taken out a warrant for it, and given an agreement to convey to *Foster* one-half." Having first given in evidence the original application taken from the files in the secretary's office and proved it to be in the hand writing of *John Foster*, except the interlineation, *John Foster's* name scored, and *Robert Chancellor's* substituted, which was the hand writing of *David Kennedy*.

At the foot of the application is a note in the hand writing of *David Kennedy*, and signed *D. K.*, in these words; "*John Foster* sent down to take out a warrant for the half, but it

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did not suit me to advance the money, I gave it to the above young man."

The letter was rejected and exception taken.

In questions respecting the beneficial interest in warrants where the names of others are so generally used, the strict rules of evidence have been relaxed. The hand writing of the original application, indorsements on it, surveying fees paid, accounts in the office of deputy surveyor charging the fees for surveying, and other acts of ownership, have been received in evidence to indicate the real application.

The rule of the land office which then obtained, that a person could not be permitted to take out a warrant or location for more than 300 acres, was probably first introduced to prevent the engrossing of large bodies of land, and perhaps was continued afterwards for the emolument of the officers. But it is well known that in general the name of the warrantee was merely nominal, and used as a kind of scaffolding to build up a regular and formal title. This rule rendered from necessity these circumstances admissible as evidence of ownership.

This letter alone, standing by itself, would be very questionable evidence, but accompanied as it is, with the original application and memorandum filed in the office, it affords satisfactory evidence that *Kennedy* acted as the agent of both parties when he substituted the name of *Chancellor* for *Foster*, and made the agreement with *Chancellor ;* and the subsequent ratification of this agreement by the correspondent covenants of the parties ; all these taken together form irrefragable evidence of the interest which *Foster* and *Chancellor* held in the warrant, and the lands to be surveyed on it, and ought all to have been received in evidence.

The defendants were permitted to give in evidence, the exemplification of a deed poll purporting to be a conveyance from *Robert Chancellor* to *James Foster*, and his heirs and assigns, of his whole right, title, and interest in the warrant. It was not offered as a genuine deed, but as a fabricated instrument. Plaintiffs disclaimed it, and excepted to its admission.

This paper could not be evidence in any way, unless to affect the plaintiffs with fraud, and an abandonment of all claim under their father. But if it could be evidence for this

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or any other purpose, their participation in the fraud and forgery should have been shown in evidence. This was not attempted. If *James Foster* whose own estate was charged with purchasing out at his expense, for the use of his own brothers, the plaintiffs, the part of the tract which was *Robert Chancellor's*, forged this deed, I cannot see why this should strip them of their father's part under the original agreement with *Chancellor*. Even had the forged deed been direct to them, if it was prepared and manufactured by *James*, who was to make the purchase for them, it ought not to prejudice them; much less reason is there that it should do so, where it is not to them or in trust for them, but to *James*, and his heirs and his assigns in absolute property. How could it be material to the issue? Why should this forged deed be put on them, they forced to claim, *nolens volens*, under a spurious and false deed, when they held a true one.

It is a just and wise maxim of the law, that nothing irrelevant to the issue should be received in evidence. It not only tends to the great delay of the public business, but has a more mischievous tendency, to bewilder the jury, and draw their attention from the rights of the parties, and fix it on some extraneous matter; on the acts and conduct of third persons, which though they might benefit, ought not to injure the parties. Here the intention of the jury would be occupied with the attempt of *James* to defraud *Chancellor* of the whole, and attaching this fraud to *John* and *William*, might fill them with indignation, and render *John* and *William* the victims of their brother's fraud, a fraud injurious as well to them as to *Chancellor*.

The evidence ought not to have been admitted.

The Board of Property has no legitimate power to vacate a patent on the ground that it had been obtained by a forged conveyance. Their authority is confined to cases of imperfect titles, warrants, locations, rights of preemption, promises. 2 *Smith* 13, Act of 5th *April*, 1782. But this body possesses no judicial power. It is for them to say in the first instance to whom the patent shall issue. But this does not decide the rights of the claimants. It is open to them for trial by jury as if no decision of the board had been made. But they can issue no *scire facias* to repeal a patent, to

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call in and cancel one patent and issue another. The Legislature have conferred no such power on them. This proceeding was a mere nullity, *coram non judice*, and the minutes not evidence of any thing. Independent of this radical objection to the proceedings, it was exposed to others; it was not a final order, in was *ex parte*, in which it was not contemplated to bring in *John* and *William* by notice to be served. This interlocutory order, *ex parte*, and not warranted by any law, ought not to have gone to the jury. It was all excess of authority; for when a patent is issued, their power is at an end; they have performed their business. For if they possessed authority to condemn and cancel a patent, this condemnatory power would be the exercise of the highest judicial authority, higher than exercised by the highest judicial tribunal in this State, and be conclusive on the rights of the parties, and without review and without appeal, giving it an effect greater than a verdict and judgment in ejectment, which is but a possessory remedy, its whole object to put the party in possession; for in truth and substance, a judgment in ejectment is a recovery of possession, without prejudice to the right, however it may appear afterwards. Even between the parties, he who enters under it, can only be possessed according to his right, *prout lex prostulat;* if he has a freehold, he is in of a freehold; if a chattel interest, he is in as a *termor;* his possession varies according to his right, and if he has no title, he is in as a trespasser. *Taylor Lessee of Atkyns* v. *Horde*, 1 *Burr.* 113.

The record of the Supreme Court, was clearly evidence for the purpose for which it was offered It was introductory to other evidence to prove that a witness who was examined on the trial, gave the same evidence he did in this; to corroborate his credit which had been impeached by testimony of inconsistent statements made by him. But the notes of Judge YEATES of what the witness swore at the former trial, ought not to have been received for any purpose, either to corroborate or contradict what he on this trial testified, or as evidence in chief. This question was fully considered in *Miles* v. *O'Hara*, 4 *Binn.* 108. It is not to be distinguished in principle from this. The death of the Judge cannot stamp his notes with higher credit than they possessed at his death. They were rejected on the ground

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that no man could be heard without oath; for however elevated the station of the officer may be, his verification must be on oath, unless where the law directs him to do an official act, for there it receives his certificate as sufficient evidence of the act being done. This holds as well in the case of judicial officers, as all others. The taking notes of evidence is not an act required by any law, and therefore his certificate or notes are no evidence that they contain the truth. It is not evidence on oath. In giving evidence of what a witness swore at a former trial, great strictness is required as to the very words uttered by him. Yet I do not give any opinion how far a case of necessity might justify in a civil action the admission of a deceased Judges' notes, as a long acquiescence in a former verdict, the death of the juror, a sedulous inquiry without effect to procure living testimony, when the trial was between the same parties and privies.

The deed of 15th *April*, 1796, from *Morrison* to *Thomas Matthews*, proved by one of the subscribing witnesses to have been executed in *Ireland*, and certified by the sovereign of *Belfast*, under the seal of the corporation, was received in evidence without any evidence of the seal. A conveyance executed out of the State, proved by one of the subscribing witnesses before any mayor or chief officer of the cities, towns or places, where such conveyance is executed, and certified under the common or public seal, such probate so certified, is made valid as if proved in the county where the land lies, by Act of 23d *May* 1715. 1 *Sm.* 94.

The seals of all public Courts established here, are received in evidence, without extrinsic proof of the genuineness; but the seal of a corporation whether foreign or domestic ought to be proved by a witness acquainted with the impression. It is not however required to prove the seal of a corporation in the same manner as the seal of an individual, that is, by producing a witness who saw the seal affixed to the identical instrument. But where a seal purports to be under the seal of a corporation, it will be sufficient to show that the seal is the official seal of the corporate body. *Phil. Evid.* 290. And such was the opinion of this Court with respect to the corporate seal of the bank of *North America*, in *Leazure* v. *Hillegas*, decided at *Chambersburg*, (*post.*) There can be no difference whether it is to prove a grant or contract made by

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the corporation itself, or the seal is used as a medium of proof to authenticate an instrument executed by others. Here no evidence was given. The seal it was contended proved itself. Nothing could be more unreasonable than to give such effect to any impression called a seal. Public convenience has required Courts to recede from the strict formal proof demanded as to private seals; but the relaxation, the admission of proof by witnesses, of the impression used by a corporation, though they did not see the seal affixed, is sufficiently liberal; farther than this the Courts have not yet gone, nor ought they to go. This statute proof of execution of a deed should be complied with, and when the Legislature required the proof of deeds executed out of the State to be certified by a chief officer, and under a common or public seal, they intended that when such deed was offered in evidence, the seal should be proved, and when the seal is proved, and not before, is the requisite proof of the execution made; otherwise any instrument conveying lands, with any seal to it, might be produced in Court as certified under the seal of the corporation where it purports to have been proved. In *England*, the only seal of a corporation which Courts will judicially acknowledge, is the seal of the corporation of the city of *London*. The deed was not recorded, nor exemplification from the record offered; but the original was received in evidence, which without some proof of the seal, ought not to have been admitted. For these reasons judgment is reversed.

Judgment reversed, and a *venire facias de novo* awarded.

MILLER *against* MOORE.

IN ERROR.

June.

An award by arbitrators appointed by

ERROR to the Court of Common Pleas of *Union* county.

the agreement of some of the children of an intestate and the husbands of some others, directing one of the parties to the submission to take the land of the intestate at the appraisement, and to pay a certain sum to the children of the intestate, is bad, first because it cannot vest the land in such party without a conveyance, which is not directed; secondly because the husbands submitted without their wives.

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This was an action upon an award. *William Moore* the defendant was a son of *William Moore*, deceased, and *Samuel Miller*, the plaintiff, was the husband of *Frances*, one of the daughters of the said *William Moore*, deceased. Both plaintiff and defendant, together with one *John Wilson*, *James Backhouse*, *John Covert*, *Isabella Moore*, and *James Moore*, bound themselves to each other respectively, in the sum of 500 dollars penalty, on condition "to stand to the verdict, agreed on by a number of auditors, chosen by said parties, to settle the estate of *William Moore*, deceased." *John Wilson*, *James Backhouse*, and *John Covert*, were the husbands of daughters of the said *William Moore*, deceased. There were other children of the said *William Moore*, who did not sign the agreement of arbitration. The arbitrators awarded, "that *William Moore*, is indebted to the heirs of *William Moore*, deceased, 657 pounds, 18 shillings, and 10 pence. *William* is to take the land at the appraisement; that is to say, at 3 pounds, 14 shillings, per acre; the one-third to be paid against the first day of *May* next; the next third to be retained in the hands of *William Moore* or his successor, with him paying the interest during the widow's life; at her death the gale then retained, is to be paid, and equally divided amongst the heirs; likewise the widow is to receive the interest of the first gale. Said *Moore* is to give sufficient security for the performance of the above articles. Given under our hands and seals this 18th day of *March*, 1800." *Samuel Miller*, the plaintiff in this suit, demanded one-eighth part of the whole sum, awarded against the defendant, being the portion to which he was entitled in right of his wife *Frances*. The Court of Common Pleas charged the jury, that the action could not be supported, and the plaintiff tendered a bill of exceptions. The jury found a verdict for the defendant.

The opinion of the Court was delivered by

TILGHMAN, C. J.—The Court of Common Pleas was of opinion, that the action could not be supported. This depends on the validity of the award. The question is then, whether the award be good, or not. It was no doubt the intention of the parties, to procure a partition of the estate of *William Moore*, deceased, by arbitration, instead of going into the Orphans' Court. But they have been unfortunate in

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their plan. The Orphans' Court would have had power to vest the legal estate of the land in *William Moore*, the defendant, without any conveyance from the other heirs, taking security from him, to pay the others their respective portions, in the manner prescribed by the Act of Assembly in such case provided. But arbitrators had no such power. The defendant cannot obtain the legal estate, without a conveyance from the others. But this award directs no conveyance. Therefore it is neither mutual, nor final. The defendant is to pay for his father's land, without getting a title to it. Besides, the submission to these arbitrators, is not made by all the proper parties. The husbands have submitted, without their wives. The wives therefore are not bound. So that if the defendant were to pay the husbands, the title of their wives to their father's land would not be extinguished. The award is radically bad. It is impossible to support it. This Court is therefore of opinion, that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

SELIN and others *against* SNYDER and others.

June.

IN ERROR.

A leading interrogatory is, when it is expressed in such a manner, as to indicate to the witness the answer which it is wished he should make; and if there be no such indication the interrogatory is fair.

If it be stated in a record of the Orphans' Court, of the proceedings for the sale of an intestate's lands, that certain administrators of such intestate came into Court, and requested the sale, one of those administrators cannot afterwards be received in a suit respecting the lands, as a witness to prove that she did not consent to the sale.

The truth of the record, concerning matters within the jurisdiction of the Orphans' Court, cannot be disputed.

If the notice be that depositions will be taken at a certain house in the borough of Lancaster, and all that appears is, that the deposition offered was taken in the county of Lancaster; it cannot be read in evidence, if taken in the absence of the opposite party. But the appearance of the adverse party cures every defect of notice.

ERROR to the Court of Common Pleas of *Union* county.

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This was an action of ejectment brought by *Anthony Snyder and others*, heirs of *John Snytler*, deceased, against *Anthony Selin and others*, heirs of *Anthony Selin*, deceased. The defendants claimed under a sale of the land in dispute, part of the estate of the said *John Snyder*, deceased, made by virtue of an order of the Orphans' Court of *Northumberland County*, on the petition of *Mary Snyder*, widow of the said *John*, (who afterwards intermarried with *Jacob Kendig*,) *John Miller* and *Simon Snyder*, deceased, administrators of the said *John Snyder*. The principal ground on which the plaintiffs rested their title, was, that the sale made by *Selin* was void, because of his fraudulent misrepresentations and threatening language at the time of the sale, by which persons were induced not to bid, or deterred from bidding. In the course of the trial, the deposition of *Mary Kendig* was offered in evidence by the plaintiffs, to certain parts of which the defendants objected, and being admitted in evidence by the Court, the defendants excepted to their opinion. One of the parts objected to, was the deponent's answer to the second interrogatory. The interrogatory was in these words. "Did you ever acknowledge the deed made for the land in question, to *Anthony Selin*? How and when did you make the acknowledgment ?" Answer. "I never acknowledged the deed in any other way than I have stated ; that is, I said in the presence of *Frederick Evans*, Esq. that I signed the deed to my sorrow." The signature of *Mary Kendig* to the deed for these lands, as one of the administrators of her husband *John Snyder*, and her acknowledgment of it before *Frederick Evans* Esq., certified by him, were in evidence.

Another question, the fourth proposed to Mrs. *Kendig*, and her answer, were as follows. "Were you or not ever consulted about applying to the Orphans' Court, to have an order to sell the land, or did you ever consent to the sale ?" Answer. "I was never asked to apply to the Orphans' Court, for the sale of the land in question, nor did I ever consent to have it sold." The record of the Orphans' Court had been given in evidence, which shewed that *Mary Snyder*, (before her marriage with *Kendig*,) *John Miller*, and *Simon Snyder*, presented a petition for the sale of the land of *John Snyder*, in order to pay his debts, and that after the land had

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been sold to *Selin*, *Jacob Kendig*, and *Mary* his wife, (late widow *Snyder*,) *John Miller*, and *Simon Snyder*, made a report of their proceedings to the Court, by whom the sale was confirmed. The record stated that *Kendig* and his wife, (late *Mary Snyder*,) *John Miller*, and *Simon Snyder*, administrators of *John Snyder*, deceased, *came into Court, and prayed*, &c.

The depositions of *Daniel Witmer* and *Peter Gonter*, read in evidence on behalf of the plaintiffs below, were also excepted to. These depositions were taken *ex parte*, under a rule of Court. The plaintiffs gave notice to *Simon Snyder*, that the depositions would be taken "at the house of *Adam Weaver*, innkeeper in the borough of *Lancaster*, on *Tuesday* the 8th of *August*, at ten o' clock in the morning." The depositions were taken on the day appointed, before *Paul Zantzinger*, a justice of the peace for the county of *Lancaster*, but it did not appear where they were taken, except that they were taken in the county of *Lancaster*.

Bellas and *Burnside*, for the plaintiffs in error.

1. In the first place, Mrs. *Kendig* is received to deny that she acknowledged the deed before the magistrate, though such acknowledgment is certified by him. Parol evidence is not admissible to contradict a deed. *Snyder's Lessee* v. *Snyder*, 6 *Binn.* 484. The consequences would be mischievous, if parol evidence were admitted to contradict the certificate of the justice. The law entrusts the justice to take the acknowledgment and make the certificate, and gives faith to them when done. In 1 *Harr.* & *M'Henry*, 211, in chancery in *Maryland*, it is decided, that no evidence can be received to invalidate the acknowledgment of a deed before two justices, agreeably to the laws of *Maryland*. But a further objection to this answer is, that the question is a leading question, and therefore the answer ought not to have been received. The former case of *Snyder's Lessee* v. *Snyder*, 6 *Binn.* 483, furnishes a precedent on this point.

2. But a point of more importance and more clear is, that Mrs. *Kendig* ought not to have been allowed to give evidence contradicting the record of the Orphans' Court, *viz.* that she

never consented to the sale. The defendants are purchasers on the faith of a sale by order of the Orphans' Court, and many titles depend on such sales. It is well settled by numerous decisions, that no averment can be received against a record. 18 *Vin.* 73. *Cruise on fines*, 35.

3. It does not appear that the depositions of *Witmer* and *Gonter* were taken at the house and at the time stated in the notice. The rule to take depositions is for the benefit of the person taking it, and it is incumbent on him to prove, that he has complied with the rule. There is no evidence on record at what place the depositions were taken. The defendant was sick when notice was served on him, and he did not attend the taking.

Lashells, contra.

1. In answer to the first error assigned, we say that the answer of Mrs. *Kendig* did not affect the deed; she did not deny that she had acknowledged the deed. She admits that she said in the presence of the magistrate, that she had signed the deed: and refers to her having sworn so before, in a former part of the deposition, which was read without objection. But if she had contradicted the acknowledgment, it would form no exception to her evidence. A deed is good without acknowledgment; it is not a material part of the deed. And the decisions shew that such acknowledgment may be explained and controlled by parol evidence. *Hurst* v. *Kirkbride*, 1 *Binn.* 616. *Gratz* v. *Evalt*, 2 *Binn.* 95. *Baring* v. *Shippen*, 2 *Binn.* 154. *M'Ferrand* v. *Powers*, 1 *Serg. & Rawle*, 102. 4 *Johns.* 161. 4 *Johns.* 230.

2. Might not Mrs. *Kendig* prove that she never consented to the sale, by order of the Orphans' Court? There was no act of Mrs. *Kendig* appearing in the record. *John Kid* clerk of the Court, signed the names of the administrators to the report of the sale. Stating that she never consented to the sale, does not contradict the record; because she might have petitioned for the sale, and yet objected to it when made. The Orphans' Court is a Court of limited jurisdiction, and their proceedings may be questioned collaterally in another suit. *Messinger* v. *Kintner*, 4 *Binn.* 97. Fines, recoveries, and other conveyances, obtained by means of forged deeds or fraud, may be avoided, *Courtright* v. *Pul-*

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teny, 2 *Atk.* 380. *Baker* v. *Pritchard*, 2 *Atk.* 387. *Englefield* v. *Englefield*, 1 *Vern.* 443. *Cruise on fines*, 221. In this case we contended below, that the conveyance was obtained from Mrs. *Kendig*, by means of fraud and of imposition.

3. As to the depositions of *Witmer* and *Gonter*. The objection is, that it does not appear that the depositions were taken at the house of *Adam Weaver*. Nothing however appears to the contrary, and therefore it should be presumed they were taken according to the notice. In *Sweitzer's Lessee* v. *Meese*, 5 *Binn*, 500, the notice was, that depositions would be taken at the house of ——*Spangler:* and depositions taken at the house of *Samuel Spangler*, were held to be well taken. In the present case, the justice makes a note that the defendant though notified did not appear. Now this must be understood that he did not appear at the place notified, and consequently that the depositions were taken at that place. The defendant received no injury. It lies on those claiming under him to shew that he attended at *Weavers*, and sustained damage by the depositions not being taken there.

The opinion of the Court was delivered by

TILGHMAN, C. J. [After stating the facts on the first point.] The reason offered by the defendants' counsel, against this evidence is, that the law, having entrusted *Frederick Evans*, a justice of the peace, with authority to take the acknowledgment of deeds, and he having certified, that *Mary Kendig* did acknowledge this deed before him, his certificate cannot be contradicted. But that question does not arise, because *Mary Kendig* did not contradict the certificate. She confesses that she acknowledged the deed, but was *sorry that she ever signed it.* This was what the plaintiffs wanted to prove. It was material for them to show, that although *Mary Kendig* executed the deed, and acknowledged it, yet she was never satisfied with the sale to *Selin*. I am of opinion therefore, that the evidence was properly received. There was another objection, not to the answer, but to the interrogatory itself as being a *leading* one. The interrogatory might have been put in a more unexceptionable manner. "*Did you or did you not*, ever acknowledge the deed?" &c.

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But I do not think that the form in which it is put, is so improper as to render it necessary to suppress the answer. Some very nice distinctions have been taken, as to what is, or is not a leading interrogatory. But I take the true mark of a leading interrogatoy to be, its being expressed in such a manner as to indicate to the witness, the answer which it is wished he should make; in that case it is said, to *lead* him to the answer. The interrogatory now under consideration is not so expressed. I do not perceive in it any disclosure of the plaintiffs' wish, as to the answer to be given. Indeed, taking the interrogatory altogether, it is fair enough. The witness is called upon, in general terms, to declare *how and in what manner she made the acknowledgment.* It seems to be taken for granted, that an acknowledgment was made, but there is not the least intimation of any *particular fact or circumstance*, which the plaintiffs desire to draw from the witness. It cannot therefore be called a *leading interrogatory.*

The 4th question proposed to *Mary Kendig*, and her answer, are also objected to. *Question,* "Were you, or not, ever consulted about applying to the Orphans' Court, to have an order to sell the land, or did you ever consent to the sale?" *Answer.*—"I was never asked to apply to the Orphans' Court, for the sale of the land in question, nor did I ever consent to have it sold." It appears by the record of the Orphans' Court, that *Mary Snyder*, (before her marriage with *Kendig*,) *John Miller*, and *Simon Snyder*, presented a petition for the sale of the land of *John Snyder*, in order to pay his debts, and that after the land had been sold to *Selin*, *John Kendig* and *Mary* his wife, (late widow *Snyder*,) *John Miller* and *Simon Snyder*, made a report of their proceedings to the Court, by whom the sale was confirmed. It is expressly stated on the record, that *Kendig* and wife, (late *Mary Snyder*,) *John Miller*, and *Simon Snyder*, administrators of *John Snyder*, deceased, *came into Court and prayed*, &c. So that the evidence is in direct contradiction of the record. The Orphans' Court were acting within their jurisdiction. They had power to receive, and to grant the petition for a sale of *John Snyder's* land, and therefore what is averred on the record cannot be contradicted. The sale may be avoided, if unfairly made, but the assertion in the record, that the parties appeared in Court, must be taken for absolute verity.

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In 18 *Vin. Ab.* title Record, *pa.* 17. *pl.* 34, several cases are cited *in the note*, on this subject. "One cannot aver that the jury was not sworn, as the record avers, nor that the jurors gave other verdict than is entered on the record. If the Sheriff return, that the party was summoned, the party shall not be received to say, that he was *not summoned*, for he cannot contradict the return directly, but he may say, that which stands with the record, as, that he was not summoned according to the law of the land," "he may show matters of fact, *out of the record*, but shall not *falsify* the record." The purchaser is bound to look to the jurisdiction of the Orphans' Court; and in some instances, the validity of their proceedings, even within their jurisdiction, has been contested in the Courts of Common Law. But the truth of their records, concerning matters within their Jurisdiction, cannot be disputed. Orders for the sale of the lands of deceased persons, are among the most frequent business of the Orphans' Court, and if administrators, who have petitioned for a sale, and prayed the Court to confirm it, shall be permitted, after many years, to deny their assent to the sale, it will occasion great inconvenience and confusion. I am therefore of opinion that *Mary Kendig's* evidence in contradiction of the record, ought not to have been received.

Exceptions were also taken in the Court below, to the admission of the depositions of *Daniel Witmer*, and *Peter Gonter*. These depositions were taken *ex parte*, under a rule of Court. The plaintiffs gave notice to *Simon Snyder*, that the depositions would be taken, "at the house of *Adam Weaver*, Innkeeper in the borough of *Lancaster*, on *Tuesday* 1st *August*, at 10 o'clock in the morning." The depositions were taken, on the day appointed, before *Paul Zantzinger*, a justice of the peace for the county of *Lancaster*; but it does not appear where they were taken, except that they were taken in the county of *Lancaster*. This is a fatal defect. It is incumbent on the party who offers a deposition in evidence, to prove that it was taken according to notice, unless the adverse party attended, in which case any defect of notice is cured. When this notice was served on Mr. *Snyder*, he was sick, and he did not attend at the taking of the depositions. The defendant might have proved, by parol evidence, that the depositions were taken according to the terms of the notice,

although omitted to be so certified by the magistrate. But no proof of that kind was produced, the depositions were offered by the plaintiffs, with no other evidence than what appeared on their face. Inasmuch then, as it does not appear that those depositions were taken at the house of *Adam Weaver*, in the borough of *Lancaster*, I am of opinion that they ought not to have been admitted in evidence. Upon the whole matter, the judgment is to be reversed.

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Judgment reversed and a *venire facias de novo* awarded.

OVERFIELD *against* CHRISTIE and another.

IN ERROR.

June.

ERROR to the Court of Common Pleas of *Luzerne* county, in an ejectment brought by *Jacob Overfield* against *Jerusha Christie* and *Hugh Osterhout*, in which there was a verdict and judgment for the defendants.

In an ejectment to recover land in Luzerne, it is immaterial whether or not the defendant claimed title under the Susquehanna Company, if the ejectment were not brought till after more than two years from the passage of the Act of 25th March, 1813.

The plaintiff gave in evidence, an application in the name of *Samuel Lefevre*, dated the 3d *April*, 1769, on which a survey was made 4th *October*, 1773, and a patent issued to *Joseph Wharton* 17th *August*, 1784. On the 7th *June*, 1813, *Joseph Wharton* conveyed to the plaintiff, in consideration of 122 dollars, 50 cents.

The defendants claimed under *Nathan Abbott*, who made a settlement and improvement in 1788. *Abbott* sold his improvement to *Lazarus Ellis*, who sold to *Peter Osterhout*, deceased, his son-in-law, the husband of *Jerusha Christie*,

It is sufficient, if the Judge charge the jury, that in order to make defence under the Statute of Limitations, there should have been a possession adverse to the plaintiff's, for twenty-one years. It is not necessary he should go farther and charge that if the defendant entered without colour of title his adverse possession was not sufficient to bar the plaintiff.

One who enters on land as a trespasser, clears it, builds a house and lives in it, acquires something which he may transfer by deed or descent: and if the possession of such persons and others claiming under him, added together amounts to twenty-one years, and was adverse to him who had the legal title, the Act of Limitations is a bar to a recovery.

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(daughter of *Ellis*,) one of the defendants, and father of the other defendant, *Hugh Osterhout*.

The defendants rested their defence on the Act of Limitations; to avoid which the plaintiff gave evidence tending to shew that after the death of *Osterhout*, Mr. *Overton*, the attorney in fact of *Joseph Wharton*, was on the land in the year 1812 or 1813, and offered to sell it to the widow *Christie* (one of the defendants) who was then living on it, who said she was unable to purchase it, and that Mrs. *Christie* and the plaintiff about the time the plaintiff purchased of *Overton*, as attorney of *Wharton*, were in treaty concerning the sums which the plaintiff should pay to her as a compensation for the improvements made by her husband. These matters were submitted to the jury by the President of the Court of Common Pleas, who told them, that in order to make defence under the Act of Limitations, it was necessary that there should have been a possession adverse to *Wharton's* for twenty-one years. The plaintiff contended also, that the defendants could not avail themselves of the Act of Limitations, because the persons under whom they claimed were seated on the land under a title derived from the State of *Connecticut*, and that having shewn no title under *Pennsylvania*, it was to be presumed that their title was under *Connecticut*. But the Judge was of opinion that no such presumption ought to be made, because a settlement under a *Connecticut* title was *criminal* under the law of *Pennsylvania*. The Judge's charge which was excepted to by the plaintiff, was placed on the record, and the objections to it were now reduced to three points.

1. That there was error in saying "that it was incumbent on the plaintiff to prove that the defendants claimed under *Connecticut*."

2. That the Judge ought to have instructed the jury, that if the defendants entered *without colour of title*, their adverse possession was not sufficient to bar the plaintiff from recovering.

3. That he ought to have charged, that *Nathan Abbott*, having entered without title, was a trespasser, and so were all those who came after him; and consequently no conti-

nuity of possession, which is essential where one defends himself solely by the Act of Limitations.

Dyer and *Hall*, for the plaintiff in error, cited Act of Assembly, *March* 26th, 1785, *Purd D.* 349. *March* 11th, 1800, 3 *Sm. L.* 421. *March* 25th, 1813, *Pamph.* 180. *April* 11th, 1795, 3 *Sm. L.* 209. 457. *February*, 16th, 1801, *Ib.* 458. 459. *Co. Lit.* 103, b. 271. a. 385. 17 *Vin. Ab.* 533, 534. 568. 593. *Old Nat. Brev.* 117.

Greenough, contra.

The opinion of the Court was delivered by

TILGHMAN C. J.—1. By the Act of Limitations, 26th *March*, 1785, no person can support an action to recover the possession of land, unless he, or the persons under whom he claims, have had possession within twenty-one years next before the commencement of the suit. But in order to protect those persons who derived titles from the State of *Pennsylvania*, against the unlawful possession of those who in contempt of the Government, pretended to derive title from the State of *Connecticut*, it was enacted, by the Act of 11th *March*, 1800, that the Act of 26th *March*, 1785, "should be repealed, and have no effect within what was called the seventeen townships, in the county of *Luzerne*, nor in any case where title is or has at any time been claimed under what is called *the Susquehanna Company*, or in any way under the State of *Connecticut*, for any lands or possessions within this Commonwealth." The land for which this ejectment was brought, does not lie within the seventeen townships, so that the case could only be affected by the defendants claiming under the *Susquehanna* Company, or the State of *Connecticut*. But there is another Act of Assembly, passed the 25th *March*, 1813, to be taken into consideration, in order to form a judgment on this case, and from that Act it will appear, that whether the defendants derived title under *Connecticut* or not, was of no importance, as regarded the Act of Limitations. By this last mentioned Act, it is provided, that in two years from the passing thereof, the Act of 11th *March*, 1800, should be repealed, and the Act of 26th *March*, 1785, (the general Limitation Act,) should, after the expiration of the

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said two years, be taken and construed to extend as fully and effectually to that part of the Commonwealth, against every person and persons whatsoever, *except those who shall have brought their action for the recovery of their possessions, within the said period of two years*, as in any other parts of the same. The policy and intent of this Act, are extremely clear. Before the passing of it, the *Connecticut* claimants had pretty generally submitted to the title under *Pennsylvania*, the Legislature having made very great and expensive efforts to effect a compromise between those who claimed under the two States. It was therefore thought prudent, to restore full effect to the Act of Limitations, in that part of the State to which the pretended title under *Connecticut* extended, taking care at the same time, to do justice to the *Pennsylvania* claimants, by allowing them ample time to bring their actions, before the Act could attach against them; and for that purpose the period of two years was judged sufficient. Now the plaintiff's action was not commenced within two years, and therefore to him it was perfectly immaterial whether the defendants had claimed under *Connecticut* or not. It is unnecessary then to enquire whether the Judge was right or wrong, in saying, that the law implied no presumption of a claim under *Connecticut*, the point being irrelevant. Even if the fact of such a claim had been conceded, the plaintiff would have been bound, not having brought his action within two years. I do not mean however to insinuate any doubt of the correctness of the charge on this point. I incline to think it was right.

2. I cannot perceive the force of the second objection. It grants the possession to be adverse, and yet calls for something more—for some *colour of title*. To be sure if a man enters, without pretence of title of any kind, into land which he knows to be appropriated, there is considerable reason to suppose, that he does not mean to deny the title of the owner, but merely to occupy the land, with an intent to become a purchaser; especially if the owner lives at a distance. But this presumption may be rebutted by proof that he set the owner at defiance. Whether *Abbott* knew of the survey on *Lefevre's* application, when he first settled, does not appear. If he did not, he no doubt intended to hold for himself against the world. I think, however, that the Judge put

that matter fairly to the jury, upon the fact, of *adverse possession or not.*

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3. As to privity between trespassers. If one enters and commits a trespass, and then goes off, and another comes after him, and commits a trespass, I grant that there is no privity between these persons, nor can the possession be said to be transferred and continued from one to the other. But I cannot see that the present case falls within that principle. Here has been a possession of four or five and twenty years, transferred in the two first instances, for a valuable consideration, and finally transferred from father to son. Each new possessor has been substantially connected with his predecessor. The law pays great regard to a possession transmitted from father to son; so great indeed, that where there was a *disseisin* and *a descent* to the heir of the disseisor, the entry of the disseisee was, at common law, taken away. Lord MANSFIELD has told us, that of *seisin* and *disseisin* very little was known in his time, *but the name.* In *Pennsylvania* we certainly have not been in the habit of going deeply into that antiquated subject; nor is it material to inquire whether *Abbot* or those who came after him acquired a *seisin* according to the strict import of the term. Our law permits all persons whether in or out of seisin or possession, to transfer their claim, such as it is, good or bad, by deed or will. And I have no manner of doubt, that one who enters as a trespasser, clears land, builds a house and lives in it, acquires *something which he may transfer to another;* and if the possession of the two added together, amounts to twenty-one years, and was *adverse to him who had the legal title*, the Act of Limitations will be a bar to his recovery. It would be extraordinary indeed, if a possession acquired without force could not be transferred, when we hold that *prior possession alone, is good title to recover in ejectment*, against all but him who shews better title. But when possession has been continued for a number of years, and has passed from hand to hand for valuable consideration, or by descent from parent to child, it has something respectable in it. The argument of the plaintiff leads plainly to this consequence, that the Act of Limitations can never take effect in favour of a defective title, unless one man lives twenty-one years; because every one who enters under a defective title is a trespasser, and

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being a trespasser, he cannot, according to the doctrine contended for, transfer his possession to another, or even transmit it by descent to his heir, so as to make a connected continued possession. If that be the case, there is little use in the Act of Limitations. But I am decidedly of opinion that the law is not so, and that it was well laid down in the charge of the Court of Common Pleas. The judgment should therefore be affirmed.

Judgment affirmed.

CLYMER and others *against* THOMAS and another.

June.

IN ERROR.

A bill of exceptions and writ of error lie on the refusal of the Court of Common Pleas, to allow to the plaintiff an amendment on the trial of the cause which was matter of right, under the Act of 21st of March, 1806, whereby the verdict passed against him.

No exception lies to the permission or refusal of the Court below, of an amendment at common law, or by some statutes: these are within their discretion.

ERROR to the Court of Common Pleas of *Union* county.

This was an action of trespass brought by *Henry Clymer* and four others, the plaintiffs in error, against *Henry* and *John Thomas*, before a justice of the peace, for cutting timber of the plaintiffs, growing on their land in the county of *Union*. The justice gave judgment for the plaintiffs, and the defendants appealed to the Court of Common Pleas. The declaration filed in the Common Pleas laid the trespass in the township of *Beaver*, in the county of *Union*, but having in fact been committed in the township of *Centre*, the plaintiffs moved, after the jury were sworn, for leave to mend their declaration, either by inserting *Centre* instead of *Beaver* township, or by striking out the township altogether; but the Court refused to permit the amendment, whereupon the plaintiffs excepted to their opinion. The jury found a verdict for the defendants, and judgment was rendered accordingly.

In trespass for an act, which the declaration states to have been committed in the township of Beaver in a county, the plaintiff on the trial has a right, under the Act of the 21st of March, 1806, to amend the declaration, by making it the township of Centre so as to correspond with the fact.

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Lashells, for the plaintiffs in error.

The sixth section of the Act of the 21st of *March*, 1806, is peremptory, that when in the opinion of the Court informality will affect the merits of the cause in controversy, the plaintiff shall be permitted to amend his declaration or statement, and the defendant may alter his plea or defence on or before the trial of the cause. The amendment prayed was entirely matter of form. The motion to strike out the township of *Beaver*, would have made the cause of action exactly conformable to the suit before the justice, in which no township was mentioned. In *Cunningham* v. *Day*, 2 *Serg. & Rawle*, 1. the Court permitted an amendment, by adding a special count, after the jury were sworn, and this Court in error held the amendment to be proper, and that it ought to be allowed, provided the plaintiff adheres to the cause of action on which the suit was brought. It cannot be pretended, that the granting or refusing an amendment authorised by this Act, rests in the discretion of the Court. Its words are positive, that the plaintiff shall be permitted to amend. It would be extremely injurious if the law should be so construed, as to leave the amendments permitted by it, in the discretion of the Court below. In the present case the cause was lost merely for want of this amendment.

Bradford, contra.

Granting that the plaintiff may have been injured by the refusal of the Court below, yet there are many things in which that may be the case, and yet no writ of error lies, 1 *Binn.* 226. A bill of exceptions ought to be on some point of law, either in admitting or denying evidence, or a challenge, or matter of law arising upon a fact not denied, in which either party is overruled by the Court. 1 *Bac. Ab.* 528. *Bull's N. P.* 515. *Phill. Ev.* 214. A writ of error will not lie to a decision upon a matter within the discretion of the Court below. As upon a motion to set aside a nonsuit and grant a new trial, *United States* v. *Evans*, 5 *Cranch*, 580. Nor upon a refusal to reinstate a cause after it has been dismissed, *Welsh* v. *Mandeville*, 7 *Cranch*, 152. Nor upon a judgment of nonsuit, *Van. Ness* v. *Buel*, 4 *Wheat.* 74. It cannot be assigned for error, that the Court below refused a continuance of the cause after issue joined,

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on account of the absence of a material witness, *Woods* v. *Young*, 4 *Cranch*, 237; or refused to grant a new trial, *Marine Insurance Company* v. *Hodgson*, 6 *Cranch* 217; 254. or to allow a plea to be amended, or a new one filed, *Marine Insurance Company* v. *Hodgson*, 9 *Cranch*, 217. 254. So there can be no bill of exceptions for refusing to allow the removal of an action brought in the State Court to the Circuit Court of the *United States*, *Carey* v. *Cobbett*, 2 *Yeates*, 277. Our Act of Assembly is not more operative than the English statutes of amendment and jeofail, or the rules of the common law. The amendment was not merely matter of form, to which alone the Act of 1806 extends. It went to introduce a new cause of action, *viz.* a trespass in *Centre* township, which is a different matter from a tresspass in *Beaver* township.

The opinion of the Court was delivered by

TILGHMAN. C. J.—Where the Court has a discretion, to permit or refuse an amendment, no exception lies to its opinion. This is the case of all amendments at common law, and some of the amendments by statute. But the most extensive and efficacious of the British statutes do not admit of a question of this kind, because they give relief, not by ordering an amendment, but by providing that the judgment shall be good notwithstanding the defect in process or pleadings. It was decided by the Supreme Court of the *United States*, in *Woods*, &c. v. *Young*, 4 *Cranch*, 237, that the refusal of the Court to grant a continuance, could not be assigned for error, because it was a matter of discretion. The same Court decided, in the *Marine Insurance Company of Alexandria*, v. *Hodgson*, 6 *Cranch*, 217, that the refusal to receive an additional plea, or to amend one already filed, cannot be assigned as error. And the reason given for these decisions is satisfactory; that amendments of this kind depend more on the particular circumstances of each case, than on any precise and known rule. Upon the same principle we decided in *Burd* v. *Dansdale's Lessee*, 2 *Binn.* 80, that the refusal to grant a new trial could not be assigned as error; and we have repeatedly held, that when the Court below decides on motions, in which it is necessary to inquire into facts not on the record, and in which the decision must rest on the discre-

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tion of the Court, as in motions to open judgments, there can be no redress in a Court of error, however great the injury, which either party has sustained. But the case before us is not of an amendment at common law, or one in which the Court was at liberty to exercise its discretion. It was the right of the plaintiffs, under the Act of the 21st of *March*, 1806. sect. 6, by which it is enacted, that "where it appears to the Court, that there is an informality in the declaration, or pleadings, which will affect the merits of the cause, the plaintiff shall be permitted to amend his declaration or statement, and the defendant may alter his plea or defence, *on or before the trial of the cause;* and if by such alteration and amendment, the adverse party is taken by surprise, the trial shall be postponed to the next Court." Now in the present case, the substance of the plaintiffs' case, was a trespass committed by the defendants, by cutting timber growing on the plaintiffs' land, in the county of *Union*. It was unnecessary to name the township, but being named, the plaintiff was bound by it, and estopped from proving the truth of his cause. It could not but appear to the Court, that this error in form, was fatal to the plaintiffs' cause, and therefore it is our opinion, that the Act of Assembly was imperative in favour of the amendment. We do not say, that in every instance, the amendment must be granted. We have heretofore decided, that where a plea in *abatement* is kept back until after the swearing of the jury, it was not the intention of the Act, that the defendant should be permitted to alter his plea, and thus defeat the plaintiffs' action. So when a plea is kept back, which ought to have been put in, *puis darrein continuance*. And many other cases may occur, not within the scope and intent of the Act. But the case before us, is a simple informality, destructive of the merits of the plaintiffs' cause, and never discovered till after the jury were sworn. It appears to us, therefore, to fall directly within the provision of the Act, and consequently the amendment was not matter of favour or discretion, but of right. It is our opinion that the judgment should be reversed, and the record returned to the Court of Common Pleas, in order that the amendment may be made, and the cause tried again.

Judgment reversed.

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TEETOR *against* ROBINSON.

June.

IN ERROR.

ERROR to the Common Pleas of *Luzerne* county.

An insolvent debtor who has been discharged by the insolvent law of New York and assigned among other property a horse in the hands of a citizen of Pennsylvania, cannot afterwards bring trover for such horse.

Trover by *Conrad Teetor* the plaintiff below, against *John W. Robinson* for a horse. *Teetor* was discharged in *New York* under the insolvent law of that State, and assigned his property, among which was, "a claim to a horse in hands of *John W. Robinson*," for which horse this suit was now brought. *Teetor* gave bond with security, according to the law of *New York*, to deliver all the assigned property to the assignees in three months.

The defendant obtained a verdict and judgment below.

Baldwin, for the plantiff in error, cited 2 *Johns.* 344. 10 *Johns.* 400. 11 *Johns.* 490.

The Court stopped *Mallory*, for the defendant.

PER CURIAM.—The plaintiff was discharged under the insolvent law of *New York*, and assigned among other things the horse, for which this action of trover was brought. After the assignment, the property was out of the plaintiff, and therefore the present action cannot be supported. The judgment must therefore be affirmed.

Judgment affirmed.

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REED and others administrators of MEREDITH *against* CIST.

IN ERROR.

June.

ERROR to the Court of Common Pleas of *Luzerne* county.

Administrators cannot maintain an action under the Act of 28th March, 1814, to recover penalties for illegal fees taken by an officer from their intestate in his life time. though they may recover back the sums paid beyond what was due. *Query*, whether they could sue if the act had given cumulative damages to the party grieved.

John Reed and others, administrators of *Samuel Meredith*, deceased, brought this action of debt against *Jacob Cist*, late treasurer of *Luzerne* county, to recover various penalties of fifty dollars each, for taking greater, and other fees than the law allows, for advertising 42 tracts of land, *viz.* one dollar fifty cents for each tract, which penalties amounted in the whole, to the sum of 2100 dollars. The action was founded on the Act of Assembly of the 28th *March*, 1814, and the case was left to the Court without argument. The Court below gave judgment for the defendant.

The opinion of the Court was delivered by

DUNCAN J.—There is one objection, if it holds good, it is laying the axe to the root of the action. Can administrators sustain an action for the penalty, under the Act of 28th *March*, 1814, (*Purd.* 223,) for establishing a fee bill. That act after prescribing the fees of the several officers, including County Treasurer and his fees, provides, that if any officer shall take greater or other fees than is expressed and limited, for services done, he shall forfeit and pay the party injured 50 dollars. The fee for advertising, including printer's charge, is fifty cents. The charge made and paid, was one dollar fifty cents, for advertising and other costs, on 42 tracts; the accumulated penalties would amount to 2,100 dollars, the sum demanded. It was a principle of the common law, that when the cause of action was founded on a misfeasance or a nonfeasance, arose *ex delicto*, that the personal action died with the person, and this rule still holds with respect to the person by whom the injury was done; but as to him on whom it was done, the

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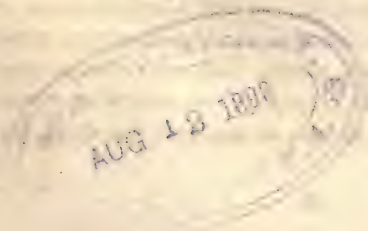
4. *Ed.* 3. *C.* 7, *de bonis asportatis in vita testatoris*, has made considerable alterations, and by an equitable construction, the executor or administrator, shall have the same action for any injury done to the personal estate of the testator, or intestate, whereby it becomes less beneficial to them, as the deceased might have had, whatever the form of action might be. So far has the equity been extended, that debt will lie by an executor or administrator, for the penalty given by the statute to the party grieved by substraction of tithes. The penalty was treble damages. But this was because there was a duty as well as a wrong; it was not altogether penalty and punishment. 1 *Vent.* 30. *Moreton's* case.

The principle to be extracted from all the cases, is this: that although the most beneficial action dies with the person because founded in tort, yet the action by which the value of the thing might be recovered, would remain against executors or administrators. But here the action is purely personal, it is a punishment; the sum to be recovered, is no part of the excess; it is not damages accumulative to the damages sustained, but is *vindictive* totally, having no relation to a connection with compensation or contract. There was no duty owed to intestate, for which his representatives claimed compensation; it was all penal infliction for a wrong done to him. I give no opinion how it might be considered if the Act had given accumulative damages, to the party grieved, making the real damages the standard, and then doubling or trebling that. There the act is not strictly penal.

The plaintiffs could recover back any thing paid beyond the legal fees, but not for the forfeiture or penalty. That is in *toto* penal. No evidence could have supported this action of debt for penalty incurred in the life time of the intestate. It died with him, and did not survive to his administrators.

Judgment affirmed.



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HUBLEY *against* VANHORNE and others.

IN ERROR.

Tuesday, June 19.

ERROR to the Court of Common Pleas of *Columbia* county.

Ejectment to *August* Term, 1816, brought by *Bernard Hubley*, against *James Vanhorne*, *Robert Montgomery*, *Thomas M'Henry*, *John M'Farran*, *and William Scott*, landlords of *Vanhorne*.

The plaintiff claimed title by warrant of the 16th *August*, 1773, to *Randall Michael*, for 300 acres adjoining *John Koyle*, and by warrant of the same date, to *Joseph Hubley*, for 300 acres adjoining *Thomas Polegreen*; and gave in evidence, receipts for the purchase money of both tracts, dated the 16th of *August*, 1773. *Joseph Hubley* and *Randall Michael* by their deeds of the 17th of *August*, 1773, conveyed to *Ludwig Lauman*, *Michael Deffendorfer*, *Christian Wirtz*, *Everhart Michael*, *William Bush*, *William Atlee*, *Adam Hubley*, *John Musser and John Hubley*. By deed of the 4th of *April*, 1775, *Bernard Hubley*, *Ludwick Lauman*, *Michael Deffendorfer*, *John Musser*, *Adam Hubley*, *William Atlee*, *William Bush* and *Everhart Michael*, conveyed to *Christian Wirtz* and *John Hubley*. Upon these warrants there was a survey made by *Joseph J. Wallis* for *Charles Lukens*, (who had been the deputy surveyor,) upon the 16th and 17th of *April*, 1777. Upon the 11th of *April*, 1793, a *caveat* was entered against the receiving of the returns of these surveys so far as they interfered with *Benjamin Chew's* survey. The Board of Property, by their order of the 15th *November*, 1796, required *William Montgomery*, the then deputy surveyor of that district, to make return of these, together with other surveys made for the same company, and in pursuance of this order, *William Montgomery* surveyed upon *Randall Michael's* warrant, 279 acres, and 28 perches, and upon *Joseph Hubley's* warrant, 112 acres, and 37 perches. Both these surveys were made upon the 24th *November*, 1796, and were returned

Surveys made in April, 1777, by an agent for the person who had been the deputy surveyor under the proprietary, are void, and give no title against an intervening survey. They might have acquired validity under the Acts of 17th March, 1780, or 5th April, 1782: but if the provisions of these Acts were not conformed to, they are not valid. The Acts of 9th April, 1781, and 4th September, 1793, do not reach the case.

A void survey is no notice to a person procuring a subsequent survey.

Where a warrant is not precisely descriptive, but only to a common intent, the title attaches only from actual survey.

The plaintiff cannot assign for error a direction given by the Court which was as favorable as his request.

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the 27th of *June*, 1797, by *William Montgomery*, the deputy surveyor. It was in evidence, that upon the 20th *November*, 1796, the surveying fees were paid, and that the taxes had been paid regularly by the plaintiff. The leading warrant was in the name of *Bernard Hubley*, which was thus described: "for 300 acres of land, to include a deer lick, and a small run; waters running a westerly course, about twenty-five miles from fort *Augusta*, and about nine miles from the north east branch of the *Susquehanna*." The other warrants of the company were adjoining this and each other until they came to *Randall Michael* and *Joseph Hubley*.

The defendants title commenced by warrant of the 23d of *February*, 1790, to *William Scott* for 100 acres, bounded by land in possession of *Abraham Kline* on *Green* creek, including a small cabin in the county of *Northumberland*; upon this warrant there was a survey of 95 acres, and 70 perches, made upon the 11th of *November*, 1796, by *William Montgomery*, deputy surveyor; and by another warrant of the same date, to *John M'Farran*, for 120 acres, on the waters of *Green* creek, adjoining *Miller's*, on the east side of said creek. A survey was made on this warrant upon the 11th of *November*, 1796, by *William Montgomery*, the deputy surveyor, of 126 acres, and 118 perches. Upon the return of their surveys it was noted by *William Montgomery*, that the whole, or nearly the whole of these surveys, were included in a survey made for the *Lancaster* Company. The purchase money of these warrants it appeared, was paid on the day they bore date.

On the trial in the Court below, the charge of the Court was as follows:

In comparing the title of the plaintiff and defendants, it will be found that the plaintiff's warrants of the 16th of *August*, 1773, are prior to those of the defendants, which are dated upon the 23d of *February*, 1790. But the surveys of the defendants, which were made upon the 11th of *November*, 1796, are before any legal survey made for the plaintiff, which was not made by *Montgomery* until the 24th of *November*, 1796. *The survey made for the plaintiff by J. J. Wallis in* 1777, *was not a legal survey, no person having authority at that time to make a survey.* Warrants are gene-

rally considered of three kinds; those which are descriptive of the land to be surveyed upon them; those which are only descriptive to a reasonable intent; and those which are called lost or removed warrants. Upon descriptive warrants, the title commences from their date, provided a survey is made within a reasonable time; but upon those which are only descriptive to a reasonable degree, the title commences from the time of their survey. Upon what are called lost or removed warrants, the title does not commence before the return of survey. *If the warrants both of the plaintiff and defendants are descriptive only to a reasonable degree, which is a fact for the decision of the jury, the title of the defendants should be preferred, as they have the first legal survey.* But if the jury believe that the plaintiff's warrants are descriptive of the land, has he used due diligence in obtaining a survey? The plaintiff's first application to the Board of Property was in 1793, which was after the date of the defendants' warrants; and the order of the Board of Property of the 15th of *November*, 1796, was after the defendants' survey of the 11th of *November*, 1796. Those surveys made by *Wallis* in 1777, have already been decided by the Supreme Court to be illegal and without authority; the Court do not consider those surveys notice to the defendants which would postpone their claim upon their warrants obtained in 1790. A deed which has been recorded, without having been previously legally proved, is not considered as legal notice to an opposite claimant, much less would marks made upon the ground, when no surveyor was authorised to make surveys. Those surveys were permitted to be given in evidence to shew with what diligence the plaintiff has pursued his claim, and for no other purpose.

The defendants had also set up on the trial, as a bar under the Statute of Limitations, a possession of twenty years, in themselves and in *Joseph Brittain* and *Jacob Force*, whose right they alleged they had purchased. The plaintiff, among other points submitted to the Court, requested them to charge the jury, as the 5th point, that neither *Brittain* or *Force*, during their occupancy of the house, ever designated their boundaries as improvers, or claimed any particular number of acres, and therefore even if the defendants were protected by

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the Statute of Limitations at all, it could only be for the exact quantity actually enclosed and occupied twenty-one years before the ejectment was brought.

The Court charged, that whether the boundaries of *Brittain* and *Force* were designated twenty-one years before the commencement of this ejectment, was a fact for the jury. There must be definite boundaries; otherwise the defendants would be confined to what they actually occupied twenty-one years before action brought.

The following errors were now assigned in this cause by the plaintiff.

1. Error in stating to jury, that the surveys of plaintiff, made in 1777, were void.

2. In stating, that under the circumstances of this case, the surveys of *Wallis* were not notice.

3. In stating, that the defendants having the first survey have the best title, if the warrants are descriptive only to a reasonable intent.

4. The fifth point proposed to the Court, was not answered, or, if answered, it was answered wrong.

Marr, for the plaintiff in error.

Hepburn and *Greenough*, contra.

GIBSON J. delivered the opinion of the Court.

The construction attempted to be given to the fifth section of the Act of 28th *January*, 1777, cannot be sustained. The proprietary estate, previous to the revolution, was undoubtedly their absolute property, and subject to their disposition without the control of the popular branch of the government; but the motive for the act lay deeper than a mere change of the form of government. To have suffered the *Penn* family to retain those rights which they held strictly in their proprietary character, would have been inconsistent with the complete political independence of the State. The province was a fief held immediately from the crown, and the revolution would have operated very inefficiently towards complete emancipation, if the feudal relation had been suffered

to remain. It was therefore necessary to extinguish all foreign interest in the soil, as well as foreign jurisdiction in matters of government. But there was an obvious distinction between what the proprietaries had appropriated to themselves as their private estate, and the mass of unappropriated land which they held only as proprietaries. To the first, they had the same title both legal and equitable, which every other member of the community had to his estate, and at the revolution were, as to those lands, as much within the policy of protection under the distribution of the public lands therefore made, as any other individual: to the second they had only the grant in the charter, which depended for its validity on a connection that had been recently severed. Governor *John Penn*, who was in *Philadelphia* at the declaration of independence, must have anticipated the events, which have since taken place; for although the land office was kept open to the *December* following, little or nothing was done: and after the passing of the Act in question, it was formally closed and the officers ceased to act. This contemporaneous construction, and submission on the part of Mr. *Penn*, shew clearly what was meant. But it would, independent of this, take much to shew, after the subsequent Acts of Assembly of the 17th *March*, 1780, and the decision in *Hubley* v. *Chew*, 2 *Sm. Laws*, 258. 2 *Yeates*, 133, that all proprietary offices not particularly excepted, were not terminated by this Act. The opinion of the Court in *Hubley* and *Chew*, upon the very title now in question, although formed at *Nisi Prius*, is entitled to every respect that a decision can receive from extraordinary abilities in the counsel who argued, and intimate knowledge of the subject matter in the Judges who decided it. Those Judges were contemporary with the transactions under consideration, and had an intimate knowledge of the customs and history of the land office. The surveys then, having been made in *April*, 1777, by *Joseph Wallis*, under *Charles Lukens*, who had been the deputy surveyor under the proprietary government, were unquestionably without authority and could give no right at the time they were made.

Have they been recognised or acquired validity pursuant to any legislative Act? Under the Act of the 17th *March*, 1780, they might have acquired validity if they had been returned pursuant to its provision; but that is not pretended.

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They were actually returned however before the Act of the 5th of *April*, 1782, the fifth section of which, gave the surveyor general a discretionary power, unlimited in point of time, to act on the subject of receiving surveys made by the late deputy surveyors, under circumstances similar to those which existed in the case before us. The returns had been taken to the office before this Act, but under what circumstances we know not: all that is certain is, that the surveyor general *never acted on them*, or received them under the Act. By what other laws then, can they have been validated?

The Act of the 9th of *April*, 1781, which enables the owners of warrants granted before the 10th of *December*, 1779, (at which period the officers of the land office, under the proprietaries, entirely ceased to act,) to obtain patents on payment of the purchase money, is said to have been in this particular, a substantial alteration of the provisions of the Act of the 28th of *January*, 1777. I cannot perceive it. The divesting Act of the 27th of *November*, 1779, had validated all grants of the late proprietaries before the 4th of *July*, 1776, and it was thought proper by the Act of 1781, to extend the time to the 10th of *December* following; but there is not a word said about *unauthorised* surveys on any of these rights. If a survey had been made by the proprietary deputy, before the 28th of *March*, 1777, it might, by the Act of the 4th of *September*, 1793, be returned by him, provided he were in office under the Commonwealth, at any time within nine years previous to the time of making such return; but this last Act clearly related to surveys before the 28th of *March*, 1777, when the officers under the proprietary government had authority; for it is expressly stated that the surveyors must have acted under legal appointments. And in all cases where surveys had not been made by the deputies of the proprietaries, while they continued to act under valid appointments, the owner of the warrant or location might, under the fifth section of the Act of the 9th of *April*, 1781, obtain an order to the surveyor general to have the survey made under the authority of the Commonwealth. All these laws, taken together, form a system, by which it was provided that proprietary grants previous to the 10th of *December*, 1776, should be protected; and that if surveys on such grants had not been made by the proprietary deputy surveyors, while they

had authority to act, they might nevertheless be made by deputy surveyors acting under the authority of the Commonwealth. But even where surveys were made by the proprietary deputies, after the expiration of their authority, those surveys might have been rendered valid under certain conditions; which have not however been complied with in the case under consideration, and the surveys must therefore be taken to be void.

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It is insisted that granting them to be so, they were still notice of a prior appropriation of the land, so as to prevent an appropriation of the same land by subsequent purchasers; and that the Court should have so directed the jury. But that would have given to them an operation and qualities, that would result only from a valid and binding appropriation of the land. Of what could they be notice, but that void surveys had been made, which could affect the rights of no one, and which, therefore, could prevent no one from appropriating the land on a subsequent warrant. The returns could be received, under the laws subsequently enacted, only in case no intervening right had attached; for those surveys were not to be established to the prejudice of subsequent purchasers, who had appropriated the same land under subsequent surveys, which were lawful when they were made. This is not even as strong as the case of a deed improperly registered, which has been held not to be constructive notice; for the existence of such deed is a fact which will always affect the party, where actual notice is brought home to him; but here the very fact of which the survey was said to be constructive notice, was altogether immaterial.

It is objected, that the jury were directed that the defendants having the earliest survey, would have the best title, neither of the warrants being precisely descriptive of the land, but each being descriptive to a common intent. The law is clear beyond dispute, that in such a case the title can attach only by actual survey. It is also objected that the plaintiff having prayed the Court to direct the jury, that the tenants in possession, having never designated their boundaries as improvers, nor claimed any definite quantity of land, would, if protected at all by the Statute of Limitations, be so only for "the quantity actually enclosed and occupied," the Court left the facts to the jury with a direction that there must be defi-

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nite boundaries, otherwise the defendants would be confined to what they "actually occupied;" and this, it is said, was not a direction as favourable as the plaintiff was entitled to have, because it might extend the protection of the Statute to what was not actually *enclosed.* But actual occupancy means a *pedis possessio,* which can only be of ground enclosed. The constructive possession supposed to result from defined boundaries had nothing to do with the cause, for there cannot be such thing; but the direction being full as favourable to the plaintiff, as he had desired in his prayer, there is no error of which he can take advantage. The judgment is affirmed.

Judgment affirmed.

NASS *against* VANSWEARINGEN and others.

Monday, June 15.

IN ERROR.

A co-heir of lands descended from an intestate, may be called by the defendant as a witness to testify against the other co-heirs, who are plaintiffs, where he is not a party to the suit.

The lands of an intestate cannot be sold on a judgment against the executor *de son tort.*

It seems that a person may be compelled to testify, though his evidence would operate against his interest, in another action.

ERROR to the Court of Common Pleas of *Mifflin* county.

Vanswearingen and others, the plaintiffs below, were children and coheirs with one other person of *Thomas Vanswearingen*, deceased, and brought this ejectment to recover their portion of a tract of land which had belonged to their father, who died intestate. The defendant below, *George Nass,* who was in possession, claimed the land under a deed from the Sheriff of *Mifflin* county, who had sold the land to him, by virtue of an execution issued on a judgment, recovered by confession against *Samuel Vanswearingen*, one of the children of *Thomas Vanswearingen*, as executor *de son tort* of his father.

On the trial in the Court below, the defendant called *Samuel Vanswearingen* as a witness, who said that he was a son and heir of *Thomas Vanswearingen,* and would not be sworn

give evidence in chief, unless the Court declared he must, and being sworn on his *voir dire*, stated the same thing. The Court thereupon refused to compel him to be sworn in chief, and the defendant excepted.

The defendant then offered evidence of the declarations of *Samuel Vanswearingen*, relative to the title, and also that all the personal property belonging to his father, had been sold by the constable. The plaintiffs objected to this evidence, and the Court overruled it. Whereupon the defendant tendered another bill of exceptions.

The Court below instructed the jury, that there was no case in their knowledge in *Pennsylvania*, in which a sale of lands on a judgment confessed by an executor *de son tort*, had been held valid, and deemed to vest a title in the purchaser, and they felt no disposition to make the precedent.

Hale, for the plaintiff in error, now contended,

1. That *Samuel Vanswearingen* was a legal witness for the defendant. He had not joined with the plaintiffs in this suit; he was in no respect a party to it, and had no interest in it. If the plaintiffs recover, he cannot enter, or take part of the profit with them, nor can he take advantage of this verdict. To disqualify him, a direct interest in the event must be shewn; the verdict must be evidence for him. A mere hope or expectation is no objection; nor a right existing in the imagination of the witness. *Peake's Evid.* 144, 145, 146.

2. If he was not a legal witness, on the ground of his being a party concerned, it follows of course that his declarations were evidence.

3. As to the main point: we contend that a sale of land, under a judgment against a defendant as executor *de son tort*, is valid. An executor *de son tort* is usually sued and considered in all respects as executor, and is liable to the amount of the assets, with which he has intermeddled. He is chargeable with debts, so far as assets come to his hands. 2 *Black. Com.* 507. 3 *Bac. Ab.* 26. In this State, lands have always been assets for the payment of debts. The land in this case was sold for 700 dollars, its full value, and the de-

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fendant has made valuable improvements, to the amount of 800 dollars.

Burnside, contra.

A judgment obtained against an executor *de son tort*, does not authorise a sale of land. He cannot retain for his own debt. He has no interest in the property of the deceased, and can maintain no action to recover it. *Toll. on Ex.* 189. 11 *Vin.* 215. A rightful administrator may falsify a recovery against the executor *de son tort*, 3 *Bac. Ab.* 24. He may recover a negro sold by the executor *de son tort*. 2 *Hay.* 179. It is decided that the heir may recover land from a purchaser at Sheriff's sale, under a judgment and execution against an executor *de son tort*. *Mitchell* v. *Lunt*, 4 *Mass. Rep.* 654. In *Pennsylvania*, as well as *Massachussets*, the personal estate must be exhausted, before the land can be sold.

2. One considering himself interested is not a witness, 5 *Munf.* 148. *Phil. Ev.* 43, 44. The witness here was interested, because the plaintiffs being part owners with him, their recovery would be for his benefit, and because this verdict would be evidence in an ejectment hereafter brought by him.

Reply.—*Samuel Van Swearingen* was left out with a view of depriving the defendant of the benefit of his testimony. The decision in 4 *Mass. Rep.* 654, as to the sale of the land on a judgment against an executor *de son tort*, was founded on an Act of Assembly, which may perhaps be different from ours.

The opinion of the Court was delivered by

GIBSON J.—*Samuel Vanswearingen* and the plaintiffs below were children and co-heirs of *Thomas Vanswearingen*, who died in possession and intestate. The record, therefore, presents the case of a tenant in common, but not a party in the cause, called by the defendant to testify against the plaintiffs, his co-tenants; and I think it quite clear, that no interest which he may be supposed to have had, could protect him from giving evidence. He was not a party on the record, and if his evidence had even gone to prejudice his in-

terest in another action, he ought to have been compelled to testify. But I cannot see that he had, in fact, any interest in the event of the action then trying. The estates of tenants in common are several; and, consequently, each recovers his own purpart. In ejectment, it is true, the right of possession is the essential matter, and the possession of one tenant in common is also the possession of the other; but that is true only where one of them is in the exclusive possession; for as the right of possession depends on the title, which is several, a recovery by one will restore him only to a moiety of the possession against the disseisor, who will hold the other moiety with him in common. It would, I grant, be different with joint tenants, who, having a joint estate, can recover only jointly; but tenants in common, whether they sue jointly or severally, lay several demises, and recover separately, each for himself, the recovery of one being in no case, the recovery of the other; although an entry by one will, to avoid the Statute of Limitations, enure to the benefit of all. I do not see, therefore, how the verdict in this suit could be evidence against *Samuel* in an action to recover his share of his father's estate; and being a legal witness himself, it is clear his *declarations* were not evidence; the Court therefore erred, in not compelling him to be sworn, but were right in rejecting his declarations.

The question whether the lands of a deceased person can be sold on a judgment against an executor *de son tort*, is new in this State, and with the exception of *Mitchel* v. *Lunt*, 4 *Mass. Rep.* 654, determined by the Supreme Court of *Massachusetts*, I believe it has not been decided in any case elsewhere. But, independent of the respect so justly due to the opinions of that Court, I am convinced, that upon principle the judgment in that case was right. Although, by our laws, lands are assets for the payment of debts, the executor has no direct authority or control over them; nor can he bring them into a course of administration, except when the personal estate is insufficient; and, even then, only through an order of the Orphans' Court. He can, it is true, confess a judgment on which they may be sold; but his power in this respect is collateral, and merely incidental to his character as the personal representative of the testator, against whom all suits for contracts made, or duties owing must, by our

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practice, be brought. The difference of power, as respects the assets, between a rightful executor, and an executor of his own wrong, seems mainly to depend on the difference between the principles on which each is respectively answerable to the creditors. The first is liable generally, in consequence of representing the *person* of the deceased, under authority delegated in the will, or in letters testamentary, or of administration granted by the ordinary; and being therefore liable to the extent of the assets, his authority necessarily extends to every part of them: the second is liable only in consequence of having intermeddled with the *goods*, and, from the nature of things, only to the extent of intermeddling. Wherefore, then, should he have authority over what he does not, and cannot, intermeddle with? The law is clear that he is executor of no more than what is in his possession. He cannot *bring an action* to recover the assets; and, although he may *receive* debts, he cannot *release* them; and if he does, the release is void even against himself, in case he afterwards obtains letters of administration. *Viner, Executors* D. a. *placita* 2, 3. *Ib.* (E. a 2) *pl.* 2. Neither can he be executor of a term *in reversion*, for no entry could be made by the lawful executor. *Ib.* (C. a. 2) *pl.* 1. As to the goods he has actually intermeddled with, the law is indisputable that he may, by lawful acts, such as paying debts in their proper degree, change the property even as against the rightful executor, who will have an action only against the wrongful executor for obtruding himself into the office of executor; but in which he will recover only nominal damages for lawful acts, and substantial damages for what has been misapplied: as if the executor *de son tort*, has committed waste of a term in possession, the reversioner may recover it from him, and the rightful executor will recover damages; but he shall not have the land again. *Viner.* (*Executor* D. a.) *pl.* 7. Thus we see the executor of his own wrong must always necessarily be a trespasser *against the rightful executor*—a trespasser *on the inheritance* is answerable only to the *heir*. Then, as an executor *de son tort* can be so only as to such goods as he has capacity to meddle with, and such as would be legitimately subject to his controul if he were rightful executor, and as the office of executor has no relation to the freehold, it follows that no one

can be executor of his own wrong as to land; at least for any thing beyond a term for years. There is no occasion to subject lands to sale on a judgment against a man who has no interest in seeing to the fairness of the claim, and thus to cast on the heirs the necessity of shewing that the recovery was collusive; for, sooner or later, there is, in every instance, a legal representative to answer demands against the estate of the decedent. The Court therefore were right in directing the jury that the sale was void; but on the first assignment of error the judgment must be reversed, and a *venire facias de novo* awarded.

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Judgment reversed, and a *venire facias de novo* awarded.

SCOTT and another administrators of HART late Sheriff *against* GREENOUGH.

IN ERROR.

Tuesday. June 26.

ERROR to the Court of Common Pleas of *Columbia* county.

This was an action by the administrators of *Jacob Hart*, deceased, late Sheriff of *Luzerne* county, against *Ebenezer Greenough*, Esq., to recover the purchase money of a tract of land, sold by *Hart* to *Greenough*, by virtue of a writ of *venditioni exponas*, issued by the Court of Common Pleas of *Northumberland* county. The land sold to the defendant had been levied on and condemned, on a writ of *testatum fieri facias*, issued by the Court of Common Pleas of *Northumberland* county, on a judgment obtained by *Thomas Craig*

Query, Whether, in case a *venditioni exponas* be issued by the Court of one county, to the Sheriff of another county, the Sheriff, after sale, may make a valid acknowledgment of his deed, before the Court of his own county, before the return of the writ?

The Sheriff has a right to demand payment of the purchase money, from one who purchases at Sheriff's sale, before he tenders a deed acknowledged.

If a purchaser at Sheriff's sale, accept a deed acknowledged by the Sheriff and keep possession of it, without objection, he cannot, when sued for the purchase money, object that the acknowledgment was defective.

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against *John Easterly*. The *venditioni exponas*, on which the land was sold, was returnable to *August* Term, 1810, and some days before the return day, Sheriff *Hart* acknowledged his deed to the defendant, before the Court of Common Pleas of *Luzerne* county, and delivered it to the defendant, who accepted it, and had it in his possession from the time of delivery to the time of the trial of this cause. The President of the Court gave it in charge to the jury, "that the Sheriff's deed being acknowledged before the return day of the writ, was not good, and not such a deed as it was necessary for the Sheriff to tender, before he made a legal demand of the money, and that the receiving of this deed by the defendant, does not preclude him from demanding a legal deed, before he pays his money, unless he received it with a knowledge of the imperfection, and a knowledge of his rights." To this opinion, the plaintiffs excepted.

Marr and *Biddle*, for the plaintiffs in error.

The Court below erred in two respects: 1st, In saying that the deed was not good; 2d, In not charging that the defendant had, by his conduct, waved any objection to the imperfection of the deed.

1. On the first point, they referred to the Act of Assembly of the 31st of *April*, 1791, Sect. 11, 3 *Sm. L.* 31. *Adams* v. *Thomas*, 6 *Binn.* 154. 2 *Yeates*, 454.

2. The acceptance of the deed was a waver in law. The Sheriff is an agent of the law. He could not make a new acknowledgment, because the defendant kept possession of the deed. The defendant, if a defect existed, was bound to point it out to the Sheriff, and require it to be amended. He must have known, that it was acknowledged before the return of the writ, because it was a sale on a *testatum*. The defendant by accepting the deed, also prevented the Sheriff from making another sale.

Lashells, contra, on the 1st point cited *Young* v. *Taylor*, 2 *Binn.* 218. Act of 1700, *Purd. Ab.* 174.

2. The defendant might have accepted the Sheriff's deed without examining it, and knowing its defect, and the Court left it to the jury to decide whether he knew of the defect.

The jury were told, the defendant would have no defence against this action, if he knew the defect and was not ignorant of his rights. The evidence on which the cause went to the jury cannot be known to this Court. He cited *Glancey* v. *Jones*, 4 *Yeates*, 212. Act of 6th of *April*, 1802, *Purd. Dig.* 511.

The opinion of the Court was delivered by

Tilghman, C. J.—Whether in case of a *venditioni exponas*, issued by a Court of Common Pleas of one county directed to the Sheriff of another county, the Sheriff who sells, may make a valid acknowledgment of a deed before the Court of his own county, before the return day of the writ, I do not think it necessary to decide, because even supposing the acknowledgment in this case not to have been good, there are other circumstances sufficient to establish the plaintiff's right of recovery. The Court of Common Pleas went too far, in saying, that before the Sheriff can demand his money, he is bound to tender to the purchaser, a deed legally acknowledged. The law cannot be so. The Sheriff is not bound to acknowledge his deed before he demands the money, because it may be that the purchaser will not pay, and in that case the Sheriff has a right to put up the land to sale again, or to return that it remains unsold, &c. The purchaser runs no risque of loss, in paying the money and accepting the deed before its acknowledgment, because the Court will compel the Sheriff to make the acknowledgment; and in case of his death before it is made, the Court may order the title to be perfected by his successor in office. What could Sheriff *Hart* have done in the present instance? The defendant accepted the deed acknowledged as it was, and retained the possession of it. The Sheriff therefore had it not in his power to make another acknowledgment, which he might have done had the defendant requested it. But it does not appear, that the defendant complained, or that the Sheriff had the least suspicion of any imperfection in the deed. Why then could not the defendant pay the purchase money? It cannot be said, that he has received no consideration—he has a good title in equity—he has, or might have had, if he chose it, possession of the land. If he has not the complete legal title, it is owing in part at least to his

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own negligence or default, and he may have the title perfected whenever he thinks proper to pursue the legal steps for that purpose. When Sheriff *Hart* made return on the *venditioni exponas* that he had sold to the defendant, and had the money ready in Court, as by the writ he was commanded, he become immediately responsible to *Thomas Craig* for the whole amount of the purchase money. It may be, that in the present situation of the country, the land would not now bring what the defendant agreed to pay for it, and it would be extremely hard indeed, if the loss would fall on the Sheriff. It is not on the hardship of the case however that this Court is to decide. The question is, was the charge of the Court of Common Pleas correct? Was it necessary for the Sheriff to tender a deed, legally acknowledged, before he demanded the purchase money? I am of opinion that it was not. In that respect the charge was erroneous. The judgment must therefore be reversed, and a *venire facias de novo* awarded.

Judgment reversed and a *venire facias de novo* awarded.

END OF JUNE TERM, 1821.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA

WESTERN DISTRICT, SEPTEMBER TERM, 1821.

DEAL'S executors *against* DEAL.

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Pittsburg.

IN ERROR.

Tuesday, September 11.

ERROR to the Court of Common Pleas of *Allegheny* county.

Account render brought by *John Deal*, senior, against *William Deal*, junior, in which the executors of the plaintiff below, were substituted after his death. The plaintiffs took out a rule of arbitration. The arbitrators met and heard the case, and filed an award in favour of the defendant, for 502 dollars, 27 cents, on the 25th *October*, 1819. The defendant issued a *fieri facias* returnable to *August* Term, 1821, and the Court below on motion of the plaintiffs, granted a rule to shew cause why this execution should not be set aside The writ of error removed only the judgment in this cause, and not the execution.

Query, whether an action of account render could be arbitrated prior to the Act of 20th March, 1821

But if it could, the referees should first have decided whether the defendant was accountable, after which another proceeding should have been had for settlement of the account. They ought not to have treated it as an action of assumpsit.

Denny and *Hopkins*, for the plaintiff in error, now assigned several errors in the judgment and proceedings below.

1st. They contended that an action of account render,

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DEAL'S executors v. DEAL.

is not within the arbitration Act of 20th *March*, 1810. It became necessary to pass an Act of Assembly, for this particular purpose, as was done by the Act of 20th *March*, 1821, *Pamphlet*. 152. The proceedings in this case being prior to that Act of Assembly, are irregular and void.

2d. Even if a compulsory arbitration might have been had, the arbitrators had no authority to award a sum of money in favour of the defendant. It appears to have been the opinion of the Court, in *M'Call* v. *Crousillat*, 3 *Serg. & Rawle* 7, that auditors have no right to find the defendant in surplusage. If the arbitrators could exercise the powers of auditors, their first award could only authorise a judgment *quod computet*, and not a final judgment.

3. They objected to the execution, because it issued after the year and day without a *scire facias*.

M'Donald, contra.

The plaintiffs took out the rule of arbitration, and ought not to be permitted to except to it. The plaintiffs below were entitled to a stay of execution for twelve months, and therefore the execution might lawfully issue, within the year and day after the expiration of the stay of execution. The arbitration Act extends, "all civil suits or actions," and embraces within its letter and spirit, an action of account render, as well as any other species of action. When the arbitrators are organised under it, they are a new tribunal, proceeding according to the directions of the Act of Assembly, and not according to the common law system before auditors. It has never been decided that an action of account render may not be arbitrated. The Act of 20th *March*, 1821, can be considered only as explanatory of the prior Act; and not as a legislative declaration, that the law was to be changed.

PER CURIAM.—This is an action of account render, in which a rule of reference was entered by the plaintiffs. The referees treated it, as a common action of assumpsit, and made an award in favour of the defendant, for 502 dollars, 27 cents. This was erroneous, for even if an action of account render, were comprehended in the Act of Assembly, on which the rule of reference was founded, the referees should in the first place have decided whether the defendant

was accountable, and made an award accordingly; after which another proceeding should have been had, for the settlement of the account. By a late Act of Assembly, referees in account render, may decide as in case of an action of assumpsit. But the present case is not affected by that Act. It is the opinion of the Court therefore, that the judgment should be reversed.

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Pittsburg.

DEAL'S executors *v.* DEAL.

Judgment reversed and a *venire facias de novo* awarded.

DARNES *against* WELSH.

IN ERROR.

Tuesday, September 11.

Under the 3d sect. of the Act of 13th April, 1807, in case of the death of a party in ejectment, the person next in interest may be compelled to appear.

THIS was a writ of error to the Court of Common Pleas of *Washington* county, in an ejectment brought by *Henry Welsh*, the plaintiff below, against *George Darnes*, the late husband of *Lætitia Darnes*, the plaintiff in error and defendant below. There had been a verdict in the ejectment for *George Darnes*, the defendant, and the Court granted a new trial. After which *George Darnes* died. A rule was then granted by the Court on *Lætitia Darnes*, to shew cause why she should not be substituted as the person next in interest, agreeably to the provisions of the 3d sect. of the Act of 13th *April*, 1807. She appeared on this rule, and refused to become a party, whereupon the Court having proof exhibited that she was in possession of the premises, and claimed title to the same as next in interest to *George Darnes*, deceased, ordered her to be substituted as defendant. There was afterwards a verdict and judgment for the plaintiff.

Campbell, for the plaintiff in error, stated, that the costs which had accrued before *Lætitia Darnes* was compelled to become a defendant, were more than the property, which consisted of a lot in the town of *Washington*, was worth.

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He contended that the 3d section of the Act of 13th *April*, 1807, which enacts, that no writ of ejectment shall abate by reason of the death of any plaintiff or defendant, but the person or persons next in interest may be substituted in the place of the plaintiff or defendant who shall have died pending the writ, contemplated only a voluntary substitution.

Waugh, contra, was stopped by the Court.

PER CURIAM.—The intent of the Act of Assembly is that the person next in interest may be compelled to appear. As to the costs preceding the appearance, it is a different question, and one not now before the Court.

Judgment affirmed.

REA *against* GIBBONS.

Tuesday, September 11.

IN ERROR.

If by an agreement in writing to refer under the Act of 1705, it be stipulated that the award shall be under the hands and seals of the arbitrators, an award under their hands without their seals, is bad.

ERROR to the Court of Common Pleas of *Allegheny* county.

The parties to this suit, *Thomas Rea and Edward Gibbons*, on the 10th *October*, 1820, entered into a written agreement under their hands and seals, to refer all their accounts, contracts, bargains, and differences whatsoever, to *J. S. J. W. & J, C.*, or a majority of them, with power to adjourn from day to day, and after taking into consideration all the said accounts, contracts, and differences whatsoever, as also the case then subsisting between the parties so far as the same should be laid before them, the said referees or a majority of them, shall make out an award in writing, under their hands and seals, and express therein such settlements, conditions, and balances due between the said parties, as to them or a majority of them shall seem just and correct; by which

award so to be made, the said parties agree to abide punctually, faithfully, and strictly under the penalty of 1000 dollars. It was further agreed that the said referees, or a majority of them should have power to make such division of all the property on the farm, between the said *Edward* and *Thomas*, as they or a majority of them should deem just, assigning to each party his own share in their said award: and to this the said parties bound themselves under the penalty aforesaid. They further agreed by a writing annexed thereto, under their hands and seals, that an amicable action should be entered wherein *Thomas Rea*, was plaintiff, against *Edward Gibbons*, defendant, and the above agreement should be entered, considered, and proceeded upon as a rule of Court. On the 12th *October*, the action was entered in the Court of Common Pleas, and on the 12th *November*, 1820, an award was made, in which after examining the accounts, two of the arbitrators found for the defendant the sum of sixty dollars with costs, and the said *Gibbons* was to have the premises in three days from that date, and to return to *Rea* all the hogs on the premises, and the same number of fowls received, and all the stock with its increase, and to return to *Rea* his team and farming utensils in as good order as received: the said *Gibbons* to take the horse bought of *Rea*, the corn and fodder stocked at the cabbin, all the oats, and straw, together with his own household furniture and cows, brought on the place with him. This award was under the hands of the arbitrators, but not sealed. Exceptions were filed in the Court below on behalf of the plaintiff, but the Court ordered judgment to be entered on the award, and the defendant within a year issued a *fieri facias* against *Thomas Rea*, to compel the payment of the sixty dollars. A motion was made by the plaintiff in the Court below, to set aside this execution; but the motion was overruled by the Court, after hearing affidavits on both sides on the question whether the defendant had performed his part of the award.

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Hopkins, for the plaintiff in error, now assigned as errors,

1. That the Court below should have awarded an issue to try whether the defendant had performed his part of the award.

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2. That the defendant could not have execution against the plaintiff without a previous *scire facias*.

3. That the award was void for want of seals, which the agreement expressly stipulated. He cited *Blackburn* v. *Markle*, 6 *Binn.* 174.

Kingston and *Biddle*, contra, contended, that the judgment on this award was justified by the Act of 21st *March*, 1806, and that the objections to the want of seals, ought not to be regarded, because the plaintiff had himself taken advantage of the award so far as it was in his favour. As to the execution it was not before this Court.

The opinion of the Court was delivered by

TILGHMAN. C. J.—In this case, the parties entered into an agreement of reference of a very special nature. The referees were authorised, not only to decide all accounts, contracts, bargains and differences subsisting between the parties, but also to make a division of a certain personal property, and the award was to be made by the three referees or a majority of them, under their *hands and seals*. Two of the referees made an award in writing, under their hands, but not under their seals; and on this award judgment was entered, the agreement of reference having been made a rule of Court. It is now said, in support of the judgment, that the *seals* of the referees were immaterial, but no authority has been shewn in support of this position. A case has been cited from *Barnes's Notes*, (*Gatliffe* v. *Dunn*,) in which it was decided, that an award not *indented* was good, though in the submission to arbitration, it was provided, that it should be indented. The Court are said to have made very light of the objection, declaring, that *indenting*, was of no more consequence than writing upon *gilt paper*. Without questioning the authority of that case, it may be observed, that *sealing* is considered in law as a matter of some importance, and if the parties who submit to an arbitration, think proper to agree, that the award shall be under seal, I know not why the Court should contradict them, or render their agreement a nullity by declaring that a seal was a matter of no importance. That an award must be under seal, when

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the submission requires it, was decided by the Supreme Court of *New York* in *Stanton* v. *Henry*, 11 *Johns.* 133, and the law is so laid down in *Kyd on Awards*, 262; and was so decided in the case of *Sallows* v. *Girling*, reported in *Cro. Jac.* 27, and *Telv.* 203, and referred to in 3 *Vin. Ab.* 116. From a view of the agreement in this case, I consider the rule of reference as entered under the old Act of 1705, and therefore not subject to the provisions of the late arbitration Acts. Many objections to the award have been urged by the counsel for the plaintiff in error, but the Court confines itself to one, which it considers fatal, *viz.* the want of seals. It is our opinion that the Judgment should be reversed.

Judgment reversed.

CARLISLE and another *against* WOODS.

Tuesday, September 11.

IN ERROR.

When a judgment appears to be regularly entered by warrant of Attorney, this Court will not on error, inquire into the validity of the bond, which the warrant accompanied, though it is sent up with the record. The party should apply to the Court below to open the judgment.

THIS was a writ of error to the Court of Common Pleas of *Allegheny* county. A replevin had issued from that Court, at the suit of *Leonard Dobbin*, against *Walter Carlisle*, directed to the defendant in error, *William Woods*, as Sheriff of *Allegheny* county, who took from *Walter Carlisle* and *James Robertson*, the plaintiffs in error, a replevin bond in the penal sum of 4000 dollars, with a warrant of Attorney, to enter judgment thereon. Judgment was afterwards entered generally in debt for 4000 dollars in favour of *Woods*, as Sheriff, against *Carlisle* and *Robertson* by confession, at the instance of an Attorney, who stated that he was such by their warrant constituted.

Hopkins, for the plaintiffs in error, now assigned for error, that it was illegal in the Sheriff to take a judgment bond from the defendant in replevin, and also that the judgment, if authorised at all, should have been entered in the

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name of *Woods*, for the use of the plaintiffs in replevin, and not in his own name.

Baldwin, contra, answered that the defendants had mistaken their remedy. The bond is not on the record: and the proper course for the defendants to pursue, was to apply to the Court below to open the judgment, if it was irregular.

Hopkins, then prayed the Court, if they inclined against him, to allow the writ of error to be nonprossed, as, if the judgment should be affirmed, it might injure their application to the Court below.

Forward, for the defendant in error, objected to this course, and contended that affirming the judgment, could not prejudice the plaintiffs in error in their application to the Court below.

PER CURIAM.—On inspecting this record, the Court see nothing but an action of debt, in which a judgment was regularly confessed by an Attorney of the Court of Common Pleas. Nothing else appears on the record; for as to the copy of the bond, on which the judgment was entered, which has been annexed to the record without authority, this Court can take no notice of it. It seems, the defendant's counsel intended to have argued, that the bond was illegal and void. But in order to come at their case, they should have applied to the Court of Common Pleas, in which the judgment was entered, and obtained their order to open the judgment, for the purpose of pleading to the declaration. As the record stands, every thing is right, and therefore the Court must affirm the judgment.

Judgment affirmed.

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THOMPSON and others *against* SMITH.*

IN ERROR.

Tuesday, September 11.

If the plaintiffs title first accrued during their infancy more than twenty-one years before the commencement of a suit, and a suit is not commenced for more than ten years after their attaining full age, they cannot recover against one having adverse possession during that time, notwithstanding being females they married during their infancy and continued femes covert at the commencement of the suit.

ERROR to the Court of Common Pleas of *Westmoreland* county.

This was an ejectment brought by *Samuel Thompson* and *Jane* his wife, and *David M'Briar* and *Elizabeth* his wife, heirs of *Archibald Lochrey*, deceased, against *George Smith*, and the question in the case arose upon the Act of Limitations. The title of *Jane Thompson* and *Elizabeth M'Briar*, first accrued during their infancy, more than twenty-one years before the commencement of this suit, and this suit was not commenced more than ten years from the time of their attaining full age. But having married during their infancy, it was contended on the part of the plaintiffs, that the Act of Limitations never began to run, because the said *Jane Thompson* and *Elizabeth M'Briar*, had been in a constant disability from the time that their title first accrued. The Court below charged the jury in favour of the defendant, and they gave a verdict accordingly.

Alexander, for the plaintiffs in error, cited the Act of *March* 26, 1785, (*Purd. Dig.* 421,) 2 *Saund.* 121. *note* 5. *Sturt* v. *Mellish*, 2 *Atk.* 610. 8 *Johns.* 262. 3 *Johns. Chancery Rep.* 129.

Forward, contra, cited *Stowell* v. *Zouch*, *Plowden*, 356. 5 *Cruise*, 198. 1 *Lev.* 31. *Salk.* 420. 4 *Bac. Ab.* 480. 1 *Black. Rep.* 287.

TILGHMAN, C. J. [After stating the point.]—The point has never been decided by this Court; it is of considerable importance, and not free from difficulty. Before I consider the Act of Assembly, it may be proper to mention, that the limitation of actions for the recovery of real property is es-

* For a former report of this case, see 2 *Serg. & Rawle*, 49.

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sential to the peace of society, and therefore the construction of S a utes on that subject, ought not to be extended by equity, so as to contravene the main object of the Legislature, by keeping up the uncertainty of title, for a great, and indefinite length of time.

Our Statute, made the 26th *March*, 1785, follows with very little variation, the *English* Statute of 21 *Jac.* I. *c.* 16. The principal difference is, that our limitation is twenty-one years, the *English*, but twenty. Our Statute begins, with enacting, "that no person shall support an action for the recovery of real property, of the seisin or possesion of himself or his ancestors, nor declare or allege any other seisin or possession in himself or them, than within twenty-one years next before such action commenced." Then follows a proviso, "that if any person having such right or title, shall be, at the time such right or title first descended or accrued, within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or beyond the seas, or from and without the *United States* of *America*, then such person, and the heirs of such person, shall and may, notwithstanding the said twenty-one years are expired, bring his or their action, or make his or their entry, as he, or they might have done before the passing of this Act, so as such person, or the heirs of such person shall within ten years next after attaining full age, discoverture, soundness of mind, enlargement out of prison, or coming into the said *United States*, take benefit of, or sue for the same, and no time after the said ten years; and in case the person shall die within the first term of ten years, under any of the disabilities aforesaid, the heirs of such person shall have the same benefit, that such person could or might have had, by living until the disabilities should have ceased or been removed." Now it is plain, that independently of the proviso, the plaintiffs would be barred from their action, because they neither made an entry, nor prosecuted an action, within twenty-one years from the time of their titles first accruing; but their case fell within the proviso, because at the time of their titles first accruing, they were infants. Then, according to the words of the statute, their title would have remained good, provided they had prosecuted it within ten years, from the time of their coming of age. But they did not so prosecute it; consequently they are not helped by the proviso. The ten years

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are to be counted from the time of the ceasing or removing of the disability, *which existed when the title first accrued.* If other disabilities, *accruing afterwards*, were to be regarded, the right of action might be saved for centuries. The descent of the title upon infant females, and the marriage of those females under the age of twenty-one, might succeed each other *ad infinitum.* The construction contended for by the plaintiffs, would be attended with public inconvenience; it militates with the main object of the law, and is not agreeable to its words. It is contrary also to the current as well as the general spirit of authorities. It was once contended on the Stat. 4 *H.* VII. c. 24, (concerning fines,) that although the period of five years allowed for claim, began in the life of the ancestor, yet it should be suspended, in case the title descended upon an infant heir. But that position was negatived in the case of *Stowell* v. *Zouch*, in the twentieth year of Queen *Elizabeth*, *Plowd.* 356, and from that time it has been settled, that when the Statute has once begun to run, it shall never stop. This decision applies to the statute, 21 *Jac.* I, and to our Statute of Limitations. It is not the point directly before us, but shews, that the Judges have refused to extend the time of entry, or action, *by equity.* But the very point in question has received a direct adjudication, in Courts of the highest respectability. In the case of *Eager and wife* v. *The Commonwealth*, (4 *Mass. Rep.* 182,) the question was upon the time of limitation in writs of error. The savings in the proviso of the *Massachusetts* Statute, concerning writ of error are pretty much like those in our Statute of Limitations, except that only five years are allowed, from the ceasing of the disabilities. A female infant, was entitled to a writ of error, and married during her infancy. Held, that no regard should be paid to her *coverture*, but she was limited to five years from the time of her attaining the age of twenty-one. In *Demarest* v. *Wynkoop*, 3 *Johns. Cha. Rep.* 129, the case was upon the *New York* Statute of Limitations, (very much resembling our own.) The title accrued to a female infant, who married before she came of full age. The Chancellor KENT, decided, on great consideration, as his learned argument shews, that no regard was to be paid to any disability but that which existed *at the time the title first accrued*, and consequently the Statute operated as a bar, unless an

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action was brought within ten years from the time of the infancy's ceasing. A different opinion was held by the Judges of the State of *Connecticut*, in the case of *Eaton* v. *Sandford*, 2 *Day*, 523. With great deference however, to that opinion, it may be remarked, that no reasons are assigned for it, and from the case of *Bush* v. *Bradley*, 4 *Day*, 298, it is presumed, that the law is not considered as settled. I find no decision upon the point in the *English* Courts, prior to our revolution. Their subsequent decisions are not permitted to be cited in the Courts of *Pennsylvania*, and if they were, they would probably afford but little satisfaction on this subject. The argument in support of the plaintiffs' construction is not void of plausibility. There are certain disabilities, which in the opinion of the Legislature, ought to stop the commencement of the running of the Statute; it is reasonable therefore, to infer, that as long as any of these disabilities exist, the Statute should not begin to run; because one disability is of as much weight as another. To this argument there is a plain practical answer; that if the principle contended for applied to its full extent, the Statute would be paralyzed. For suppose that during the ten years allowed for entry, &c., after the ceasing of the first disability, a second disability should occur, why shall you not wait until that has ceased; and in the meantime, another may have occurred which will have an equal claim. But it cannot be pretended, that after the first disability has ceased, and the ten years have begun to run, any regard shall be had to a new disability, first accruing during the ten years. Our Act of Assembly is indeed not clearly or accurately expressed, when it speaks of a persons dying under a disability *within* the ten years. But the meaning is, that if the title first descends or accrues to a person under disability, and that person dies before the disability cease or be removed, his heir, whatever may be his condition as to ability or disability, shall have the same benefit that he himself might have had, by living until the disability had ceased, that is to say, he shall have ten years from the death of his ancestor—but if the person to whom the title first descends or accrue, being then under a disability, shall live till the disability cease, then ten years, and no more, shall be allowed to him and his heir, in case he die within the ten years. There is no expression in the Act which has a regard

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to any disability but one, *viz.* that which existed when the title first descended or accrued, nor to the disability of any person but one, *viz.* the person to whom the title first descended or accrued. The good effects intended by the Statute, might be frustrated by a series of disabilities. It was this consideration which induced the Judges to take their stand against the extension of time by an equitable construction, so long ago as the reign of *Elizabeth*, and this induces me, after turning the question on every side, viewing it in all its bearings, and following it to all its consequences, to concur with the Judges of *New York* and *Massachusetts*. I am of opinion, that notwithstanding the marriage of Mrs. *Thompson* and Mrs. *M'Briar*, during their infancy, and their continued coverture ever since, they are barred from their action, because it was not commenced within ten years from the time of their arrival at full age. The judgment is to be affirmed.

GIBSON J. was sick and absent at the argument, and delivered no opinion.

DUNCAN. J.—The question of abandonment or dereliction is often one of mere fact; but acts of desertion may be so strong, absence so long continued, as to justify the Court in considering it a matter of law, and so to instruct the jury. It was in this case left to the jury; so was the question of adverse possession. If *George Smith* entered, and took possession as the trustee of the plaintiffs, the Act of Limitations would not run; for he could no more change his character of trustee, than a tenant could his character of tenant; he would be equally bound to restore the possession to his *cestui que trust*, as a tenant would to his landlord. The rule that a party shall not change the ground of his possession, is a just one: if a trustee is in possesion, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*, and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title; just as in the case of a lessee for years, though he does not pay his rent for fifty years, his possession is no bar to an ejectment, after the expiration of this term, because his possession is according to the right of the party, against whom he seeks to set it up; so of a possession obtained by fraud; but the

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Statute begins to run from the discovery of the fraud. A Court of Equity cannot impeach a transaction on the ground of fraud in obtaining the possession, if the fact of the alleged fraud was within the knowledge of the party twenty-one years before, during all which time it was open to him to prosecute his claim. After the discovery of the fraud, a man has a right to avail himself of the Statute ; but so long as the fraud is unknown, pending the concealment of the fraud, the Statute ought not to run. The discovery of the fraud, gives a new right of action ; but whether the possession when taken was an adverse act, or obtained by fraud, were facts for the jury, and to them it was submitted ; if they have drawn erroneous conclusions, the plaintiffs' remedy was by motion for a new trial. There certainly were circumstances, from which a jury might have inferred, that the entry of *Smith* was not adverse, or that it was fraudulently obtained from the step-father of the plaintiffs. The time when *Smith* took possession, directly after *Guthrie* had left it, the time when the warrant was taken out, the call of the warrant for improvement, dating it back to the original settlement of *Archibald Lochrey ;* these were strong facts, and would have warranted a different conclusion. *Guthrie's* possession was the possession of his step-children, he would be presumed to enter as their guardian, and if he covinously delivered up the possession to *Smith*, as there has been no conveyance to a third person, the Statute would only begin to run against the plaintiffs, from the time of their knowledge, and when they were under no disability. To encounter this, there is the long acquiescence of the plaintiffs residing in the neighbourhood, affording an evidence of their relinquishment, independent of statutory provisions ; and putting them out of view, the dormitancy of such a claim resting on mere equity, and depending on possession and residence as the only *indicia* of the right, their long acquiescence in the possession, and looking on while *Smith* was making his improvements, were circumstances which ought to have their weight with a jury ; yet it must strike the mind with force, that when *Smith* took the possession, there was nothing like abandonment. Had the children of *Lochrey* been even adults, the possession could scarcely be said not to have continued in them: it was not a vacant and abandoned settlement on which *Smith* entered. It is the not reclaiming the possession

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for so many years, their suffering *Smith* to proceed with his improvement, the acquiescence in his right, from which a presumption might arise, that in their own view of the subject, something had taken place, the evidence of which might be lost in the lapse of time, that his possession was rightfully obtained. But these circumstances were left to the jury; their attention was called to them by the Court, and they were desired to draw their own inference. The concluding part of the charge must be taken in connection with all that precedes it, and it would not be treating the charge of a Court with fairness, to decompose it, and scan and scrutinize it sentence by sentence; no human production could stand against such test. In this part of the charge, I cannot say that I find any thing erroneous, or that might tend to mislead the jury.

But if the entry of *Smith* was adverse and fraudulent, were the plaintiffs within the exception of the Act of the 26th of *March*, 1785, for the limitation of actions to be brought for the inheritance or possession of real property. This Act is nearly in the same words as the Statute of 21st *Jac.* I, with an addition hereafter to be noticed. The ancestor *Archibald Lochry*, died in 1781; the plaintiff, *Jane*, was born in 1776, *Elizabeth*, in 1779; *Jane* married in 1793, *Elizabeth* married under age. This action was brought in 1813; the Court decided that they were barred by the Act at the end of ten years, after their arrival at twenty-one, though they married during the disability of infancy, and have remained covert. It is a rule applicable to this as well as to all Statutes barring or terminating rights, that the party who would extricate himself from the enacting clause, must bring his case strictly within the exceptions, *Innes* v. *Barnes*, 2 *Gallison*, 319. The plaintiffs here are barred by the enacting clause, unless their case falls within the proviso. It is matter of surprise to find that in *England*, even up to this time, the doctrine of successive or accumulative disabilities is not settled; the Judges of the King's Bench holding, that there cannot be such succession, within the benefit of the proviso; while in the Common Pleas they hold, that the ten years do not run during the continuance of disabilities; all disabilities, as they hold it, must cease before the ten years begin to run. A very judicious author, in his *Law of Vendors*, *Sudgen*, 317,

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is of opinion, that the latter is the true construction, and the construction invariable in practice; while another writer in a very well arranged treatise on the *Law of Ejectment*, supports the former construction, *Adams*, 56. The succession of disabilities here is in the same persons, and the plaintiffs contend, that though their infancy at the time their title first accrued, does not bring them within the benefit of the proviso, yet as another disability accrued before the termination of their infancy, they are brought within it, because there has been no time since the right first accrued, in which they have not been disabled. This appears at first view quite reasonable, but when we reflect on the policy of the law and the words used by the Legislature, a different conclusion must be drawn. The disability when the right first accrued is the disability provided for. That is the point of time to be considered, and that is the disability excepted out of the enacting clause; it would be extending the privilege of one disability by an equitable construction, far beyond the letter of the law, to cover all disabilities, as they rise in succession, and against the spirit of all the limitation enactments, the end being to extinguish dormant rights, to give security to long and undisturbed possessions, and quiet and repose to those whose possession had been long acquiesced in; but if disability were added to disability, coverture to infancy, claims might be protected and kept alive to an indefinite extent of time, and the Act be in operation for centuries. In several of the States, a construction has been put on similar clauses, correspondent, as I think with the words of the provision, and the intention of the Legislature. In *Massachusets*, *Eager* and *wife* v. *The Commonwealth*, 4 *Mass.* 182, the precise point arose; the plaintiff was an infant, and before the termination of her infancy, she married; it was held, that the latter disability not existing, when the right first accrued, she was not within the benefit of the provision. In *Connecticut*, *Eaton* v. *Sandford*, 2 *Day*, 523, a contrary construction was given, but the question was still considered as open, and in *Bush* v. *Bradley*, 4 *Day*, 298, there is a very able opinion of Mr. Justice SMITH opposing it. In the Court of Chancery, *New York*, 3 *John Ch. R.* 129. *Demarest* v. *Wynkoop*, all the cases down from *Stowel* v. *Zouch*, *Plowd.* 358, are reviewed, and that was likewise this very case; during

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the infancy of the plaintiff, a second disability ensued by marriage, and it was made a question, whether a succession of disabilities, closing one on each other could be permitted as an excuse within the proviso; it was decided that it could not, but that the disability entitling the party to the benefit of the proviso, must exist when the right first accrues, so that if during the ten years allowed to an infant, a subsequent disability, as coverture arise, the time continues to run, notwithstanding such second disability, and that successive accumulating disabilities are not within a settled and sound construction of the law; and it was again so decided in the Supreme Court of the State, 18 *Johns.* 40. But there is an explanation in our Act, not to be found in the Statute of *James* I, "in case such person or persons shall die within the said term of ten years, under the disabilities aforesaid, the heir or heirs of such person shall have the same benefit, that such person or persons could or might have had by living until their disabilities had ceased or been removed." Thus it is evident, that the Legislature intended that in all cases the bar should be complete, if entry was not made, or ejectment brought within ten years after the removal of the disability existing in the person in whom the title first accrued, and when it first accrued, as if the person had continued to live, and never intended a succession of disabilities in the same person; one disability, and that when the title first accrued, was alone contemplated and alone provided for. The words of the proviso, the plain meaning of the Legislature, the spirit and policy of the Act, and the weight of authority, are against the construction contended for, by the plaintiffs in error. The ten years began to run the moment the existing disability ceased and continued to run, notwithstanding other supervening disabilities. None are provided for, but such as exist at the time the right of entry first accrues; but if several disabilities existed at the time, the provision would extend to all, or the one which continued the longest.

Judgment affirmed.

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LIGGET *against* The Bank of Pennsylvania.

Tuesday, September 11.

IN ERROR.

If the drawer or previous indorser of a promissory note is offered as a witness in a suit against a subsequent indorser, to prove that the plaintiff had discharged the subsequent indorser, and is objected to by the plaintiff, and rejected by the Court, and afterwards the plaintiff withdraws his objections, and the defendant refuses to examine them, it is not error.

If the drawer of an indorsed note gives a mortgage bearing the same date as the note, though not executed till some days after, for securing the payment of the note, it does not merge the note or discharge the indorser.

ERROR to the Court of Common Pleas of *Allegheny* county.

This case was argued by *D. S. Walker* and *Hopkins*, for the plaintiff in error, and *Biddle*, for the defendant in error.

The opinion of the Court was delivered by

TILGHMAN C. J.—This was an action brought by the *Bank of Pennsylvania*, against *Thomas Ligget*, on two promissory notes, of which one *David Pride* was the drawer, and the defendant, *Ligget*, the third indorser. The defendant gave in evidence a mortgage from the drawer of these notes, to the bank, as security for the payment of the notes, and then offered to prove by the oath of *Pride*, the drawer, that by a subsequent arrangement between him and the bank, the defendant was discharged from his responsibility as indorser. To this evidence the plaintiff objected, and the Court decided that it ought not to be admitted; upon which the plaintiff offered to admit the evidence, but the defendant refused to examine the witness, and excepted to the opinion of the Court. Another exception was taken to the Court's opinion, with respect to the admission of the evidence of *Christian Latshaw*, one of the indorsers of these notes, who was offered as a witness by the defendant, and rejected by the Court. In this instance, also, the plaintiff offered to admit the evidence after the Court had decided the point, but the defendant refused to examine the witness. It is immaterial whether the Court decided right or wrong, because the defendant was not injured by the decision. The evidence was in the defendant's power, and therefore it lies not in his mouth to complain of its rejection. But his counsel have contended, that he was injured, because the jury would have been prejudiced against evidence, which in the opinion of the Court was illegal. There is no weight in this objec-

tion. When the plaintiff offered to admit the evidence, it became legal, although before it might have been illegal. As soon as the plaintiff's consent was given, the Court would have permitted it to go to the jury. And the jury having heard it with the Court's permission, it is not to be presumed that they would have been prejudiced against it. When evidence is offered, and admitted by the Court, if the party who offered it, means to take an exception, he must do it immediately, and the reason is, that the adverse party is entitled to the option of admitting the evidence, rather than have his cause involved in the trouble and hazard of a writ of error. It is frequently done, and I never before heard it suggested, that after an offer to admit the evidence, an exception could be supported.

2. The Charge of the Court has been objected to; because the jury were told that the indorsers were not discharged by the mortgage of the drawer. This is a point too plain to admit of doubt. Certainly the indorsers were not discharged. The defendant's counsel have compared the mortgage to a *bond*, which operates as a merger of a *note*. But there is no analogy between the cases. A note is merged in a bond, because a bond is an instrument of a higher nature than a note, and both being debts, the inferior is absorbed in the superior. There could be no possible advantage in preserving a note, when a bond was given by the same person, for the same debt. But a mortgage is only a *security*, and its nature is quite different from the debt secured by it. It is a *conveyance of land*, and it is of great importance that it should not be confounded with the *debt*. The title of the mortgage may prove defective, and the debtor may then be resorted to, personally, by suit on the note. The mortgage contains no covenant to pay the money. It is a security altogether collateral to the note. So far from a mortgage being considered as a merger of a debt due by simple contract, it is a very common species of security. It is not intended by the parties as a merger. In this very mortgage the debt due by note is recited, and the mortgage is declared to be a security for the payment of the note, and *is to be void if the note is paid.* Both note and mortgage bear the same date, and were intended to be simultaneous acts, though it hap-

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pened that the mortgage was not executed till some days after its date.

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It is the opinion of the Court, that upon both points, the law is clearly with the defendant in error, and therefore the judgment should be affirmed.

Judgment affirmed.

MORRIS *against* TRAVIS.

MORRIS *against* WILKINS.

Tuesday, September 11.

IN ERROR.

A survey, of which only one line has been run and marked on the ground, is not good to shew, that the defendant had intruded within the lines of the plaintiff's land.

It seems, a survey of which only one line is run and marked on the ground, is void; but though only one line is found, it may go to the jury as evidence to presume others marked, and if accompanied with possession and acts of ownership for twenty-one years, may form a title.

ERROR to the Court of Common Pleas of *Armstrong* county, and bills of exceptions to the charge of the Court.

Ejectments brought by *Casper W. Morris*, against *Robert Travis* and *John Wilkins*.

The plaintiff on the trial in the Court below, produced warrants and surveys and patents thereon, and the question was, whether they embraced the lands on which the defendants resided.

In the suit against *Wilkins*, the Court charged the jury among other things, that the plaintiff had shewn a legal title to seven-twentieths of a tract of land containing one thousand acres, and witnesses had been examined to shew that

So, if a general marked outline enclose several tracts, it is a good survey of the whole; and the intermediate lines established for division or sale, may be good, though not marked on the ground.

The silence of the Court concerning the testimony of a witness, is not a withdrawal of it from the jury.

Evidence of the improvements made by the defendants is admissible in ejectment, to rebut the evidence of the same kind given by the plaintiff, though otherwise not correct.

the defendant was in possession. The only corner found on the ground, applicable to the survey, was a white oak. On measuring the distance from that corner to the next, which, on the draft, was an asp, some marks were found along the line. No asp was found at the end of it, but some aspen grubs, as well as some of hickory and sassafras. In answer to a question put by the plaintiff's counsel, the Court further charged, that if but one line was measured by the deputy surveyor from one corner to another, although it was marked from corner to corner, and no other line was either run or marked, this would not, although extended, be an execution of the warrant under which the plaintiff claimed. If the other lines had been run, this ought to appear by probable testimony, as by connecting it with other lands, which either then or afterwards were surveyed.

In the suit against *Travis*, the charge of the Court was, in substance, the same in this respect. In summing up in this latter suit, the Court omitted to notice the testimony of *Alexander Craig*, given on behalf of the plaintiff. The verdicts in both suits were in favour of the defendants, and the plaintiff excepted to the charges of the Court respectively.

In the ejectment against *Travis*, the plaintiff gave evidence respecting the improvements made by the defendant: the defendant afterwards offered evidence of the extent of these improvements: which was objected to by the plaintiff, and admitted by the Court. The plaintiff excepted.

Foster, for the plaintiff in error.

Kelly, contra.

One opinion was delivered in both these cases, as the opinion of the Court, by

GIBSON J.—The question before the jury, was not whether the plaintiff's title to the land included by the diagram of the survey returned, should be affected by reason of the lines of the survey not having all been run out and marked, for the Court declared at the outset that the title was good; but

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whether the defendant had intruded within the plaintiff's lines. It is true that near the conclusion of the charge, the Court did, in effect, say that a survey, of which only one line has been run and marked, is void; but even if the case had been left on that ground, there would have been no error, for the very point was resolved in *Fugate* v. *Cox;* and I think there are arguments in favour of the doctrine that can never be successfully encountered. By this, I do not mean to say, that a survey will be void wherever no more than one line *can be found.* That one line is found marked on the ground, may be a circumstance of more or less weight, to go to the jury as evidence that the other lines were marked and run also: and such evidence being accompanied with possession and acts of ownership during the requisite period, (which, in analogy to our Statute of Limitations, I take to be twenty-one years,) will raise a *legal* presumption in favour of the regularity of the survey. But although the survey of an insulated tract, of which only one line was in fact run, would unquestionably be void against a person subsequently appropriating the same land under a purchase from the State; yet where a general marked outline encloses several tracts owned by the same person or by a number of persons, (which would undoubtedly be a good survey of the whole,) I can see no reason why the intermediate lines as plotted on the diagram, should not be valid for all purposes of division between the original owners, or purchasers from them when the lands thus surveyed have been retailed. If then the plaintiff had shewn, by producing the warrants and the diagram of the general survey, that this was one of a number of tracts laid together by a common boundary, and that by a survey of the intermediate lines according to their courses and distances, the defendant was found to be within the lines of the draught of this particular tract, the case would have been clear of all difficulty. But this was not done, and in the case as disclosed, I cannot see how the survey, which appears to have been void from the beginning, could, even admitting the plaintiff had title, have any operation for the purpose of defining boundary; because if it could in any aspect, it must necessarily have been sufficient to guard subsequent appropriators from surprise, and have been a valid appropriation of the land in the first instance.

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But it is objected, the Court withdrew the evidence of one *Craig* from the attention of the jury. But this no further appears, than that in summing up on the question of fact, the Court was entirely silent as to the operation of his testimony; which was by no means a withdrawal of it. Again it is objected, that the defendant was permitted to shew the extent of his improvements on the land he had in possession; but this it was competent for him to do, if for no other reason, to rebut the evidence the plaintiff had given on the same subject. The judgment is therefore affirmed.

Judgment affirmed.

M'CONNELL *against* M'COY.

IN ERROR.

Thursday, September 13.

ERROR to the Court of Common Pleas of *Allegheny* county.

In slander, a declaration stating the words to have been spoken in the third person, is not supported by evidence of words spoken in the second person.

Elizabeth M'Coy, the plaintiff below, brought this action of slander against *William M'Connell*. The first count of the declarations alleged, that the defendant spoke of and concerning the plaintiff the following words, "she is a thief and I can prove it." The second count charged him with saying of her, "she is a thief and a whore, and I can prove it."

When a rule of Court authorises a rule for taking depositions to be entered of course, stipulating reasonable notice, the construction of the rule must so far as respects the necessity of specifying the number of days notice in the rule, depend on the usage and practice of the Court.

On the trial, the plaintiff offered in evidence the deposition of *William M'Coy*, taken under a rule to take the depositions of ancient, infirm, and going witnesses, on reasonable notice. The rule stipulated no particular period of notice. The notice given was nine days: and it was, that the deposition would be taken at the house of *Rachael M'Coy*, in *Green* township, *Beaver* county. This deposition was objected to

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by the defendant, because the period of notice ought to have been ten days: and because it did not specify with sufficient certainty the place of taking it. The Court overruled both objections, and admitted the depositions, and the defendant excepted.

The evidence given by the plaintiff as to the speaking of the words was, that they were spoken by the defendant in the second person, to the plaintiff.

The Court charged the jury, that the variance between the declaration and the evidence, was immaterial, and that the testimony supported the charges in the declaration. This charge was also excepted to by the defendant. The jury found a verdict for the plaintiff below, and judgment was entered thereon.

Wilkins and *Baldwin*, for the plaintiff in error, now contended,

1. That the deposition of *W. M'Coy* ought not to have been admitted in evidence, because sufficient notice was not given. The rule of Court ought to have stipulated the notice. The house also was uncertainly described: its locality ought to have been fixed by a further description.

2. The words proved did not support the words charged. It is well settled that the words proved to have been spoken in the third person, support words laid in the second, yet the reverse is not the rule. The variance is material, because words spoken in the third person are an evidence of deliberation and malice. They cited in support of these positions, *Cro. Eliz.* 857. 8 *Johns.* 74, 75. *Bac. Ab. tit.* slander. *Johnson* v. *Tate*, 6 *Binn.* 121, *Bull. N. P.* 5.

Forward, contra.

1. The practice of the bar is to enter the rule as was done in this case, and it is the most convenient practice. The Court below however, is the best judge of its own practice, and of the reasonableness of the notice. As to the place of taking the deposition, the notice is in that respect sufficiently certain. The country is not thickly settled, and the house if not known could easily have been discovered.

2. In reality there is no difference between words spoken in the second and third person: the distinction set up in some cases between them is artificial and unreasonable. Courts now look at the substance of the charge, and hold that it is enough to prove the words substantially. Our Courts have gone beyond the *English* Courts in this respect. But even there we are not without authority. Lord HARDWICKE, in *Nelson* v. *Dixey*, *Cas. Temp. Hard.* 305, lays it down, that when words are laid to be spoken in one person, proof of words spoken in another, will support the declaration. He also cited, *Bac. Ab. tit.* slander.

The opinion of the Court was delivered by

DUNCAN J.—Two questions are presented for the consideration of the Court.

1st. Was the deposition of *William M'Coy* properly read in evidence.

2d. Did the words proved maintain the allegation in the declaration.

The just construction of the rule of Court, that a party applying for a rule to take depositions of witnesses, may enter the rule of course in the Prothonotary's office, stipulating a reasonable notice to his adversary is, that the rule itself should stipulate, that is, fix and ascertain the number of days notice; but in the construction of these rules, usage, when it is not repugnant to the principles of natural justice, ought to be greatly respected. The practice of every Court is considered as the law of the Court. The course of the office and variety of precedents, though they passed *sub silentio*, and no question had been made of them, or judicial decisions, are strong evidence of the usage.

It is merely a matter of practice, to establish which we can have recourse to no other source of information, than the records of the Court, and the officers of the Court, and the gentlemen of the bar practising in the district.

The enquiry is not, whether this practice originally was right, but whether such practice has prevailed. The records of the Court, the officers of the Court, and many of the gentlemen of the bar, prove that a practice had prevailed for some time before the trial of this cause, to enter the rule in this form, and not to stipulate the reasonable notice in the

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rule itself, but to fix and ascertain it in the notice given to the party; and however some respectable members of the bar may have privately murmured, yet no application had been made to the Court to change the practice; and here this judgment gives us the opinion of the Court of Common Pleas, that such had been the usage under the rule. The opinion of the Court, giving their own construction of their own rule, the usage, (where no injustice is done to the suitor, and whether the rule itself stipulated the notice, or the notice itself gave the time, the result would be the same, and the Court in each case exercise the like power of judging, whether the notice was a reasonable one,) ought to govern in reviewing a judgment on a question of practice.

The slanderous words are alleged in the declaration, to have been spoken *of* the plaintiff, the evidence was that they were spoken *to* her. The Court were of opinion that this supported the issue, that there was no substantial difference between words spoken to or of a man.

The law is now well settled, that the plaintiff is not obliged to prove the words precisely as laid, it is sufficient to prove their substance; but the sense and manner of speaking must be the same. Words spoken to a mans face in passion are more excusable, than if spoken deliberately behind his *back;* the latter is the course in which malignant slander is usually propagated. Slander to a mans face cannot be justified, but it seldom has the strong mark of deliberate malignancy that distinguishes back-biting. The case of *Nelson* v. *Dixey*, *Cas. Temp. Hard.* 305. contains a *dictum* attributed to Lord HARDWICKE, that words in the second person, are supported by proof of words uttered in the third person; this was not the case in judgment, and of many sayings attributed to Judges, as *obiter dicta*, it might well be pronounced *nunquam dicta*, but whether respect is justly due to all that comes to us, in the name of that distinguished Judge, all that he has said to have said, cannot be ranked as judicial decisions, nor controul the judgment in the very point presented for decision.

In *Avarillo* v. *Rogers*, *Bull.* 5, Lord MANSFIELD recognised at *Guildhall*, the substantial distinction, and decided that the variance was fatal; this is the opinion of but one Judge, but a very illustrious one, who was not disposed to

entangle justice in nets of law, whose well spent life was employed in separating substances from the unmeaning forms with which they had been mingled, and in breaking down senseless distinctions and technical subtilities; but it rests not on his opinion, for it has been recognised as the law in many instances, and many plaintiffs have been non suited for this variance. In *New York*, this is received as the acknowledged doctrine of the law, 1 *Johns.* 74. *Miller* v. *Miller.* It is true that in *Tracey* v. *Harkins*, 1 *Binn.* 395, the Court of Common Pleas for the city and county of *Philadelphia*, decided differently; the reasons given for that decision by no means satisfy this Court, that there is no substantial difference between words spoken to or of a man, and they are of opinion, this was not the old law, nor the law at any time; for they find that whenever the direct question has directly been presented, the substantial difference has been acknowledged and established. But there is another reason, than the different malignancy of the two sets of words, which weighs with me. The object of all declarations, is to give notice to the party of the charge, that he may come to the trial prepared to defend himself. But when a defendant finds that he is not charged with speaking slanderous words to the plaintiff, he may be conscious, that he never held any conversation on the subject, but with himself and to his face, and may securely repose in confidence that it is impossible for the plaintiff to make out his allegation, and would be surprised by a different charge, of which, had he been apprised by the declaration, recollecting the conversation and the persons present, he might come prepared to shew the mistake and misrepresentations of the plaintiff's witnesses, might explain the occasion and manner of speaking the words, and by the antecedent and subsequent parts of the same sentence prove the sense was innocent or the occasion justified, and might mitigate the damages by such evidence. I am therefore of opinion, that the variance was fatal, the manner being different from the allegation, the slander more malignant, the defendant not apprised by the declaration of the charge, for which he was called on the trial to answer, so that he might defend, justify, or explain it.

Judgment reversed.

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HANNA *against* BURKHOLDER.

Tuesday, September 11.

IN ERROR.

In covenant if defendant pleads covenants performed, and entry is made on the docket *and issue*, it is to be considered as a direction to the Prothonotary to make a formal entry of the issue, and the omission to do so is merely a clerical error.

ERROR to the Court of Common Pleas of *Westmoreland* county.

Narr in covenant brought by *Burkholder* against *Hanna*. Defendant pleaded *covenants performed*, and the words "*and issue*" were entered on the docket. The error now assigned was, that no issue was joined. The case was submitted to the Court without argument.

PER CURIAM.—We consider the words, *and issue*, in this case to be a direction to the Prothonotary, to make a formal entry of the issue, and the omission to do so, no more than a clerical error which may be amended.

Judgment affirmed.

SUTTON *against* HORN.

Tuesday, September 11.

IN ERROR.

Referees appointed under the Act of 1705, are not authorised to find the facts specially and submit the law to the Court. The report must be good *per se* to justify the entry of a judgment upon it.

ERROR to the Court of Common Pleas of *Somerset* county.

This was an action of *replevin*, in which *John Horn*, the defendant in error was plaintiff below. Having been submitted to reference by consent of both parties, under the Act of 1705, the referees reported, "it appeared to them that *John Horn*, who was duly appointed constable of *Somerset* town, did regularly depute *William Cooper*, as his deputy, and did thereupon remove with his family from the said town

into the township of *Somerset:* that after such his removal, *viz.* 29th *November*, 1816, *William Cooper* lived in a house, the property of *Philip Austine.* The referees therefore submit to the Court, that if the office of constable of *Somerset* town became vacant by the removal of *John Horn* as aforesaid, and the deputation of the said *William Cooper* ceased by reason thereof, then and in that case they found for the defendant; otherwise for the plaintiff, the sum of 14 dollars, 81 cents damages, with costs of suit, &c." On this report the Court below entered judgment for the plaintiff.

Alexander, for the plaintiff in error, now submitted that the referees had no right to find facts specially, and submit the law to the Court. The award must be final. And even if they had power to find facts, the facts found here are not sufficient, for the Court to draw any conclusion of law from them.

Forward, contra, contended that by the Act of 1705, a report of referees is to be deemed and taken to be as available in law, as a verdict of twelve men, and the party shall have judgment. It is put on the footing of a verdict, and therefore the facts may be found specially, as a jury may find a special verdict, and judgment may be rendered thereon. The act moreover requires the Court to approve the report, which distinguishes it from an award at common law. For in giving or withholding such approval, the Court can investigate the law or the facts of the case.

The opinion of the Court was delivered by

TILGHMAN, C. J.—By the Act of 1705, the award of the referees, "being made according to the submission of the parties and approved of by the Court, and entered upon the record, shall have the same effect, and shall be deemed and taken to be as available in law, as a verdict given by twelve men, and the party to whom any sum of money shall be awarded to be paid, shall have judgment, &c."

This award is wanting in an essential quality; it is not *final*, but instead of deciding the matter in dispute, refers the decision to the Court. This was contrary to the intent of the parties, who submitted the decision, not to the Court,

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but to the referees. No award should be approved of by the Court, but one which is in itself a perfect award. The plaintiff's counsel have endeavoured to support this award by comparing it to a special verdict. They say, that judgment is to be entered on it, as on a verdict, and therefore judgment may be entered as on a special verdict, which finds the facts, and refers the law to the Court. But this is not the true construction of the Act of Assembly; by which it was not intended to alter the nature of an award. The award must be good *per se* in order to authorise the Court to enter judgment on it. By the by, if this award were considered as a special verdict, it would not answer the plaintiff's purpose, for supposing the constable who made the levy to have been a lawful officer, it is not found that any warrant or execution came to his hands authorising him to make the levy mentioned in the award.

It is the opinion of the Court, that the award should be set aside, and the judgment reversed.

Judgment reversed.

RIDDLE *against* MURPHY and another.

Monday, September 17.

IN ERROR.

Where both plaintiffs and defendant claim under the same right, the plaintiffs are not bound to trace back their title beyond the person holding that right. If there be an adverse right, it lies in the defendant to shew it.

If an administrator purchase the land of his intestate at Sheriff's sale, on a judgment recovered for an alleged debt of the intestate, in an ejectment afterwards brought by the heirs of the intestate, who allege the judgment to be fraudulent, if it do not appear that the debt was bona fide, and if the administrator had assets to pay it, they may recover the land against the administrator on the ground of fraud, without previously tendering the money paid by him or the value of his improvements.

The Court will not reverse for an erroneous expression of the Court's opinion on a fact, unless it clearly appear that the jury were thereby precluded from deciding for themselves.

ERROR to the Court of Common Pleas of *Washington* county.

This was an ejectment brought in the Court below, by *John Murphy* and *Rosanna Jackson*, against *Samuel Riddle*,

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to recover a tract of land in *Washington* county. The land had belonged to *Cornelius Murphy*, who held under an improvement right, and died in 1802. By his will he devised it to his daughters *Alice* and *Ann Murphy*. The plaintiffs who were the brothers and sister of *Cornelius Murphy*, claimed as the heirs at law of *Alice* and *Ann*, who it was proved had gone away from the State prior to the death of *Cornelius Murphy*, and had not since been heard of. The defendant, *Samuel Riddle*, was the son and devisee of *John Riddle*, who was the administrator with the will annexed, of *Cornelius Murphy*, and had purchased the land at a Sheriff's sale which took place under an execution issued to *August* Term, 1804, upon a judgment obtained by one *William Williamson*, against the said *John Riddle*, as administrator of *Cornelius Murphy*, by the confession of *John Riddle*. *Riddle* afterwards perfected the title. The plaintiffs alleged that this judgment and the sale thereon were fraudulent; that if the debt were due to *Williamson*, *S. Riddle* at the time of the sale had assets in his hands to pay the same; that the land was purchased by him greatly below its value, and gave evidence of these and other circumstances to impeach it. It appeared also, that in 1808, an ejectment was brought in the name of *Alice* and *Ann Murphy*, against *John Riddle*, which was removed to the Supreme Court, and tried in 1811: a verdict was found for the plaintiffs and a new trial was awarded; and the costs were afterwards paid by *John Murphy*, who had conducted the suit on behalf of the plaintiffs in that suit. The other plaintiff *Rosanna Jackson*, was then examined as a witness for the plaintiffs.

Several objections to the plaintiffs' right to recover were made, and the opinion of the Court was reduced to writing, and filed of record.

In the first place, the defendant objected that the plaintiffs had not shewn a title in *Cornelius Murphy*, under whom they claimed. To this the plaintiffs answered, that they had proved that *S. Riddle* came into possession as the devisee of *John Riddle*, who purchased the land at Sheriff's sale as the property of *Cornelius Murphy*, and as he held *prima facie* in this right, they were not bound to go farther back unless

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the defendant shewed some title in himself *aliunde*. The Court charged, that as no other right had been alleged by the defendant than that arising under the Sheriff's deed to his father, the plaintiffs were not bound to go beyond it.

2. As the title of *Cornelius Murphy* was only inchoate, and as the plaintiffs had been out of possession when this suit was brought, for more than seven years, the defendant relied on the 5th sect. of the Limitation Act of *March*, 1785, *Purd. Dig.* 420, as barring their recovery. On this point the Court charged as follows.

With respect to the construction of this Act we observe, that it refers to *adverse possession*, which the policy of the law in the case enumerated says, shall be quieted after seven years, unless the party having *inception* right shall proceed to perfect title. It does not apply to cases of *fraud*, unless discovered within the time limited, nor even if the fraud is discovered, unless the party to be injured is conscious of it. It is not material that others are acquainted with it, if the person who is barred be ignorant. Were *Alice* and *Ann Murphy* then ignorant of the circumstances of fraud upon which their claim was asserted at the trial in 1811? In point of fact, we have it well established that neither of them were here prosecuting the suit, nor have we any evidence that they were then living—they were searched for and advertised in the newspapers by Mr. *Read* and Mr. *Doddridge*, for four years up to 1819, without success. We cannot believe therefore, that they even knew of the transactions, and if *they* had instituted this suit, the Act would not bar them. But it is said, that *John Murphy* and *Rosanna Jackson*, the present plaintiffs, knew of the fraud, and are therefore precluded by the limitation. It is true, that *John Murphy*, in behalf of his nieces, conducted the former suit, when the unfairness of *Riddle's* conduct was developed, and must have been apprised then of the facts now produced in evidence. It is also true, that *Rosanna Jackson* was a witness at the trial. But at that time neither had any interest in the litigation,—they could not be bound to *notice* what they could not redress. If in 1811, they could not have supported a suit in their own right, their knowledge of the facts of fraud, will not cause the Act to run then against their title derived thereafter. Has the limitation then elapsed since their title

accrued? If it has, with a knowledge of the fraud concurrent, they cannot recover, for *Cornelius Murphy* had a mere *inceptive* right, which has been since perfected by *Riddle*. *This leads to the inquiry, whether Alice and Ann Murphy were alive at the death of their father John, and are since dead without issue, and if so, whether more than seven years before the bringing of this suit.* The proof on this subject is presumptive, arising from the repeated searches and inquiries made after them, and from the lapse of time. This however *may* afford ground sufficient to satisfy you that they were dead before the suit was commenced. Evidence that a man has not been heard of for many years, is *prima facia* enough to prove him dead, without issue, &c. As it respects these persons, the only certain information we have of them at all, is the testimony of the declarations of *Cornelius Murphy* to *Peter Kidd*, Mrs. *Riddle* and *David Jones*, that he had two daughters in *Carolina*. Mr. *Doddridge* in the course of his inquiries, heard that *at some time* they had been in *Green Briar* county, in *Virginia*, and from thence had removed west, but could not be traced further. The date of his last search was in 1808 or 1809. Mr. *Kidd* has never heard of them at all since the death of *John Murphy*, although he advertised for them fourteen or fifteen years ago in *Staunton, Virginia*. If from these circumstances the presumption of the death of *Alice* and *Ann Murphy* within seven years prior to the bringing of this suit, is sufficiently strong to satisfy you, every difficulty from the Statute of Limitations is removed, and we proceed to examine the real and substantial merits of the case.

3. The defendant contended, that the plaintiffs could not recover, because there was no tender of the purchase money paid by *J. Riddle* for costs or improvements on the land in question. The Court charged as follows.

The defendant concludes by an additional legal objection, which is, that a tender has not been proved before suit brought, and that therefore the plaintiffs cannot now recover. To this we observe, that if you bring the case to that point, it is not necessary, because the administrator by his own shewing had, at the time of the sale, assets sufficient to discharge the debt.

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4. It was now assigned for error, that the Court erred in giving their opinion or directions to the jury as to the facts, and therein exceeded their legal and constitutional province. That part of the opinion to which this objection was made, was as follows:

The defendants resist the claim of the plaintiff on the legal point first noticed, and also by denying that the evidence respecting *Alice* and *Ann*, affords sufficient presumption of their death. And to repel the suggestions, he produces the record of an ejectment brought by *Alice* and *Ann Murphy*, against *John Riddle*, to *March* Term, 1808, for this tract of land. This suit was removed to the Supreme Court, and tried in *March*, 1811, when there was a verdict for the plaintiffs, and new trial was awarded. It appears that the costs were afterwards paid by *John Murphy*, and it is contended, that here is his admission that his nieces were alive at that time, as he prosecuted the suit in their right. Any such inference however, is removed by the proof we have, that before this inquiry had been made at the request of *John Murphy*, for his nieces, in different places without success, and that in fact he did not know they were in being.

The case was argued by *Riddle* and *Campbell*, for the plaintiffs in error, and *Waugh*, contra.

The opinion of the Court was delivered by

GIBSON J.—The plaintiffs below are the heirs of *Alice* and *Ann Murphy*, the devisees of *Cornelius Murphy*, under whom the defendant also claims. *John Riddle*, who devised the premises to the defendant, and who was also the administrator of *Cornelius Murphy*, confessed a judgment on which the land was sold, and became himself the purchaser. The questions below, which are again agitated here, were: 1. Whether, if the cause were with the plaintiffs on all the other points, they would not, nevertheless, be bound to shew title in *Cornelius Murphy*, at the time of his death: 2. Whether it sufficiently appeared that *Alice* and *Ann Murphy* were dead: 3. Whether the plaintiffs could recover without first tendering a sum sufficient to cover the purchase money, costs, and any improvements that may have been made by *Riddle* the purchaser, or the defendant his de-

visee:—to which is added, here; 4. That the Court gave a binding direction as to matters of fact.

1. Both parties claim under the same title: it is too clear, therefore, for argument, that the plaintiffs were not bound to trace back their title beyound *Cornelius Murphy*. If there was a title adverse to his, either in the Commonwealth or a third person, it lay on the defendant to shew it.

2. Whether *Alice* and *Ann Murphy* were dead at the bringing of the suit, was a question of fact; and we cannot look into the record to see whether there was sufficient evidence to warrant the verdict. But it is objected that the jury were instructed, that a legal presumption of death arises from absence for seven years, where the party has not been heard of within that period.—Nothing like this is found in the record. As the title of *Cornelius Murphy* was only inchoate, and as the plaintiffs had been out of possession for more than seven years, it was insisted that the fifth section of the Act of Limitations of 1785, interposed a bar. The Court, very properly, charged, that if the sale was fraudulent, the act began to run against the devisees of *Cornelius Murphy*, or those who represented them, only from the time the fraud *became known to the person then having the title.* There was no proof that *Alice* or *Anne*, on whom the title first devolved, ever knew of the fraud, or indeed, of their interest in the land; but the plaintiffs were long acquainted with whatever fraud may have existed; the Court therefore charged that if, *by the death of Alice and Anne seven years before the inception of the suit*, the title was united, in the persons of the plaintiffs, to a knowledge of the fraud, they would be barred. It is plain, therefore, the direction was different from what it is said to have been. In speaking directly to the evidence of death, the Court, after stating it, say that it *may* afford ground to satisfy the jury that *Alice* and *Anne* were dead before the suit was commenced; and then state, as a rule, that proof that a person has not been heard of for *many* years is *prima facie* evidence of his being dead;—and conclude with telling the jury, that if the circumstances in evidence, were sufficiently strong to raise a presumption that *Alice* and *Anne* had died within seven years before the bringing of the suit, every difficulty before presented by the Statute of Limitations, was removed. The Court therefore specified no time as suffi-

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cient to raise a legal presumption of the death of an absent person; but submitted the matter as, (what it must always necessarily be,) a pure question of fact, to be decided from a consideration of the whole case. The objection on this ground, therefore, fails.

3. The plaintiffs claimed under an equitable title; and to succeed, it was necessary to prove such a fraud in *Riddle*, the administrator and purchaser, as would induce a Court of Equity to treat him as a trustee, and compel him to reconvey; and this is what the Court mean, when, in answer to a question about the necessity of a tender, they say: "if you bring the case to *that* point, a tender is not necessary." That is; the plaintiffs cannot recover unless they shew that a fraud was committed; without which, it will be unnecessary to consider the effect of want of tender; but if you bring the case to the point at which the consideration of it does become necessary, we are of opinion a tender is not essential. Here the plaintiffs had put their case on the proof of a nefarious fraud; and although the maxim, that he who has committed iniquity shall not have equity, does not extend to the case of a defendant, still I think that independent of this, the defendant had not, under the circumstances of the case, such an equity as would entitle him to insist on having any thing refunded. It did not, and cannot, appear that the money advanced, was paid on a judgment for a *bona fide* debt of the estate. But taking it that the debt had not been trumped up for the occasion, and that the fraud consisted in permitting the land to be sold for a debt while assets sufficient to discharge it were in the administrator's hands, it is plain the money paid on the judgment is to be considered as an advancement out of the funds of the estate, for which the administrator would be entitled to a credit, on the settlement of his account. He could not claim to be reimbursed in the character of a purchaser; for if the sale was fraudulent, it was a nullity. But take it that the money was advanced out of the administrator's own pocket, and that he afterwards charged himself with, and settled for, the assets actually in his hands at the time of the sale: still the real estate is liable only secondarily, and in aid of the personal estate, which is the appropriate fund for payment of debts; and, therefore, if the advancement was a charge on the whole estate, it could

come on the land, only on a supposition that the administrator had it not in his power to apply the personal estate; which is directly the reverse of a fact necessary to be assumed before the question can arise. But further; if the defendant could hold till he should be reimbursed for the advancement of his devisor, it would, in effect give him power to appropriate the real estate to the payment of the debts, in the first instance; and, even if it were otherwise, I know not how he could retain possession, where the money must be considered as advanced by him, not in the character of a purchaser, or on the credit of the sale, but in discharge of his duty in the payment of a debt. His claim to compensation for improvements stands on worse grounds still. The entry of the administrator, in the guise of a purchaser, was by fraud, and, therefore, no better than an entry without even colour of title; and it would be monstrous to permit a wrong doer to retain the possession against the lawful owner, till he should be reimbursed for improvements that may have been even an injury to the inheritance. This objection also fails.

4. The last assignment of error is, that the Judge gave a binding direction as to matters of fact. We all readily agree as a general rule, that where facts are withdrawn from the jury, there is error; but the difficulty is to apply it to particular cases. A Court will not reverse, unless for plain and obvious error. Where therefore the Judge has not expressly assumed the office of the jury, the inference, that the latter must have understood the expression of the Court's opinion, as an inhibition to judge of the truth of the facts, ought to be a necessary and a natural one. A bare suspicion, that they were misled as to the extent of their powers, will not be sufficient. I would apply to such a case, the same measure of probability, which governs where there is a direction in matter of law, right in itself, but so imperfect and obscure that there may be some reason to apprehend the jury misconceived the law: in which case I hold, that obscurity is not error, where it is no greater than to lead to a suspicion that the jury were misled; for no expression of opinion can be so explicit as to preclude every possibility of misapprehension, and, as I have already said, a Court should not reverse unless the error is plain and palpable. I have carefully examined this record, without being able to discover any thing

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to give rise, even to a suspicion, that the jury thought themselves precluded from deciding any of the facts; and I, therefore, cannot say there is error. On this subject the cases have already gone as far as the doctrine is convenient, and I am not prepared to take an inch of ground in advance. The judgment is affirmed.

Judgment affirmed.

MORRISON *against* BERKEY.

Monday, September 17

IN ERROR.

A surety for another in a bond, who gives the obligee a new bond with surety, and a warrant of Attorney, on which judgment is entered up, but no money is paid cannot recover against the principal in an action, on the common money counts, for money paid, &c.

ERROR to the Court of Common Pleas of *Somerset* county.

Assumpsit in the Court below by *Peter Berkey* against *Abraham Morrison*. The declaration contained three counts.

The first count stated that *Berkey* had become surety for and on behalf of *Conrad Piper* and *Joseph Vickroy*, trading under the firm of *Piper* and *Vickroy*, in the penal sum of 1600 dollars conditioned for the payment by the said *Berkey*, *Piper* and *Vickroy*, or either of them of the sum of 800 dollars to a certain *George Kimmel*, jun., and the same afterwards became due, and was demanded by the said *George Kimmel*, jun., and the said *Piper* and *Vickroy* neglected to pay: that afterwards *Morrison* became a partner with *Vickroy*; and the money being due and unpaid, the plaintiff intended to pay it, and institute a suit against *Piper* and *Vickroy* for reimbursement and indemnity; and was proceeding to do so, when the defendant, in consideration that he would not proceed to pay off the bond, and institute a suit, and would allow *Piper* and *Vickroy* a reasonable time to raise the money, promised to indemnify the plaintiff from all damages to rise by being surety, and if the money should not otherwise be paid, would

pay the same and would be responsible for the said debt, averring that the plaintiff in consideration thereof did not proceed to pay off the bond or institute suit against *Piper* and *Vickroy*, and allowed them a reasonable time, *viz.* four weeks to raise the money: that *Piper* and *Vickroy* did not pay the debt, but the same remained and yet remains due and unpaid by *Piper* and *Vickroy*, nor was it paid except by the plaintiff, who was obliged to pay, and did pay the debt and interest in full. Nevertheless &c. The second count was for money paid, laid out and expended by the plaintiff to the use of the defendant. And the third for money had and received.

On the trial in the Court below, in *June*, 1819, the plaintiff, to support the declaration, offered in evidence a bond, dated the 24th of *March*, 1812, purporting to be from *Berkey*, *Piper* and *Vickroy*, to *George Kimmel*, jun., corresponding in other respects with the declaration, but it was signed "for *Piper* and *Vickroy*. *Conrad Piper*," with a seal annexed, and also signed and sealed by *Peter Berkey*; on this bond was indorsed a receipt of satisfaction in full, signed by *George Kimmel*, jun. The defendants objected to the admission of this bond in evidence, on account of the variance, but the Court admitted it "to shew the amount of the claim, not as evidence of the *assumpsit*." To this opinion the defendant excepted.

The plaintiff then produced as a witness *George Kimmel*, jun., who testified that in the summer of 1812, the defendant said that he had become a partner of *Vickroy*, in the room of *Piper*. He requested *Kimmel* to wait nine months for the payment of the bond, and acknowledged he was liable to pay the bond. After the nine months had expired, *Kimmel* asked the defendant to pay the money, and told him the time was up. He said he was not able to pay the amount, but would pay the interest, and he paid *Kimmel* 48 dollars, on account of one year's interest, a receipt for which was indorsed on the bond. *Kimmel* saw *Piper* and *Berkey* sign the bond, but *Vickroy* was not present and did not sign it. *Berkey* never paid *Kimmel* the money. On the 12th of *August*, 1814, he gave *Kimmel* a judgment bond with *Joseph Reed* as security for

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the amount of the debt and interest: the judgment was entered in *Somerset* county, and remained unsatisfied. *Piper* and *Vickroy* were discharged from their debt, by the judgment bond of *Berkey* and *Reed*. *Kimmel* did not recollect that *Berkey* called on him to give him time; or that he knew that the defendant was to pay the bond. The defendant advised *Kimmel* to bring suit against *Berkey*, and brought him a note from *Berkey* addressed to *Kimmel*, in which *Berkey* informs *Kimmel*, "I have seen Mr. *Morrison*, and have been consulting with him, and he says the best for me in regard to the bond in your hands against me is, as he will direct you to, for them and me." The defendant asked *Kimmel* to give him the bond to bring suit against *Berkey*, having just come from *Berkey's*. This was some time after the receipt on the bond. *George Graham* was present and said, "*Morrison*, you have assumed to pay this money." *Morrison* said he had not. *Graham* said you have. *Morrison* said no more. *Kimmel* considered his debt secured by *Berkey* and *Reed*. He had given notice that the proceeds of the sale of *Joseph Reed's* property, then, (at the time of the trial) selling by the Sheriff, should be paid towards his judgment against *Berkey* and *Reed*. He did not know of any property owned by *Piper* and *Vickroy*. He considered *Berkey's* land worth 4000 dollars.

Joseph Vickroy, another witness, produced on behalf of the plaintiff stated that *Piper* and he were in partnership, and had a loan of 800 dollars from *Kimmel*; part of it was in money, and part in clothing and provision for their hands. The whole amount was for the use of *Piper* and *Vickroy*. He thought *Piper* made the contract with *Kimmel*. The defendant and *Vickroy* made a contract afterwards in writing, and *Morrison* agreed to pay some of the debts. The defendant and *Vickroy* had an arbitration and settlement between them, when *Vickroy* was found in arrear about 3500 dollars: the defendant was to pay him 1000 dollars, and then he would be behind about 2500 dollars. He did not know that the defendant got credit in the settlement for the amount of *Kimmel's* bond. He purchased out *Piper's* interest, and then took the defendant as a partner. Some months afterwards he thought this bond was mentioned in the settlement. The

defendant admitted that *Piper* and *Vickroy* were insolvent in and before 1814. The plaintiff then proved a judgment obtained by *Thomas Vickroy*, at *May* Term, 1812, and a mortgage given by them to *Daniel Livingston*, on the 9th of *May*, 1810.

George Graham was then produced as a witness for the plaintiff, who testified that the defendant came to his house about the time he entered into partnership, and said he wanted to know what time the creditors of *Piper* and *Vickroy* would give. *Graham* said that he would give nine months. *Kimmel* was present and said he would give the same. The defendant said that was very well. He then said I have entered into partnership. *Kimmel* and he talked about their debts. In the evening the defendant shewed *Kimmel* a schedule of the debts he was to pay, but the witness did not recollect whether this bond was in it. His own claim was in it, and the defendant had since paid that.

The plaintiff then proved the petition of *Joseph Vickroy*, at the term when the trial took place, for the benefit of the insolvent law, and also the record of a judgment at *May* Term, 1815, in favour of *George Kimmel*, jun., against *Berkey* and *Reed*, and a *scire facias* to *May* Term, 1816, on which *nulla bona* was returned. He then proved a memorandum of an agreement made on the 3d of *August*, 1812, between *Joseph Vickroy* of the one part, and *Abraham Morrison* of the same county, of the other part; that the said *Vickroy*, in consideration of what followed, covenanted and agreed to convey, assign and confirm to the said *Morrison*, his heirs and assigns, forever, the one undivided interest and half part of *Mary Ann Forge*, with the land and stock thereto now belonging, and the undivided half of all the horses, wagons, tools, houses, household furniture and implements of every kind and description, attached to and properly belonging to the said premises and concern. Subject nevertheless to all mortgages and judgments now binding on the said premises, that is to say, the one half part of the said mortgages and judgments, and subject also to the payment of the one half of the outstanding debts, contained in a schedule hereunto annexed.

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In consideration of which, the said *Morrison* agreed to discharge and fulfil the contract between the said *Vickroy* and *Conrad Piper*, paying to the said *Piper* twelve tons of bar iron, agreeably to the said contract. The sums due by the said *Piper* to the late firm of *Piper* and *Vickroy*, to be deducted therefrom. And the said *Vickroy* and *Morrison* thereby entered into partnership, to carry on the said forge, at their joint expense, and to be equal sharers in the profit and loss. And the said *Vickroy*, further on his part, agreed to manage the said works personally, with vigilance and fidelity, during the said partnership thereby entered into. And the said *Morrison* agreed to attend at *Pittsburg* from time to time, to contract for the sale of iron, and transact all business there that the firm might think necessary to promote their mutual interests. And it was further agreed, that neither of the said parties should sell or dispose of their interest in the said forge and premises to any other person, without previously consulting the other partner, and giving him the refusal thereof, on the terms which may be offered. And it was further agreed by the said parties, that in case any difference or dispute should arise between them, which they cannot otherwise accommodate, the same should be submitted to three respectable men, to be mutually agreed on by the said parties, whose decision shall be final.

For the true and faithful performance of all and singular which said covenants and agreements, the said parties bound themselves to each other, their heirs and assigns, &c.

To this agreement was attached a list of debts, as nearly as the same could be ascertained, among others *George Kimmel*, jun. 800 dollars.

To this evidence the defendant demurred, and prayed the judgment of the Court that it was not sufficient to entitle the plaintiff to maintain his action: the defendant joined in the demurrer, and the Court rendered judgment for the plaintiff; the counsel having, before the jury were discharged, agreed, instead of assessing contingent damages by the jury, that judgment should be rendered for the sum of 1108 dollars, 65 cents, if the Court's opinion should be in favour of the plaintiff.

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Alexander and *Baldwin*, for the plaintiff in error.

The Court erred in allowing the bond to be read in evidence, because it did not correspond with the bond set forth in the declaration. The declaration throughout, speaks of the bond, as the bond of *Piper* and *Vickroy*; whereas the bond given in evidence, is signed and sealed only by *Piper*, for *Piper* and *Vickroy*, and is not the bond of *Piper* and *Vickroy*, but of *Piper* only. The bond of one partner is not the bond of both partners. 1 *Dall.* 119. That such a bond existed as that averred, was a material fact. It was not merely requisite to shew the amount due. If it be considered as evidence only for that purpose, then the proof is deficient in not shewing such a bond as the declaration alleges.

The evidence given in the cause, did not support any of the counts in the declaration. There is no bond of *Piper* and *Vickroy* proved, as is there stated: nor that *Berkey* was about to pay the bond and put it in suit: nor that the defendant below had requested *Berkey* to delay suing or to give time to *Piper* and *Vickroy*; he spoke with *Kimmel*, not with *Berkey*. There is no proof that the defendant below, assumed to pay *Berkey* or in any way to indemnify him. Nor is there any evidence that *Berkey* paid the money to *Kimmel*, but the reverse is expressly proved. There was no contract with *Berkey*. *Kimmel* states, that he does not know that *Berkey* was informed that the defendant below would pay the bond. Further, there is no proof that the defendant below was to pay on demand: if at all, he was to pay after nine months. And lastly, there is no proof of notice to the defendant below of the nonpayment, unless his payment of interest can be so considered. It is a general rule, that in all actions of assumpsit on special agreement, the contract must be proved precisely as it is laid. *Gilb. Evid.* 386 to 390. 2 *Serg. & Rawle*, 68. In 2 *Johns. Rep.* 213, this rule is recognised and established on facts similar to the present. The terms of the partnership entered into by *Morrison*, did not make him liable for *Piper's* debt. If the money was borrowed by *Piper* for the use of the partnership, so as to give an equity against the partnership funds, it ought to have been so specially alleged. Giving a bond is no payment to support the allegation that *Berkey* had paid the money to *Kimmel*, particularly as it appears that the bond is not paid,

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and the amount is claimed out of *Reed's* property. 8 *Johns. Rep.* 156.

The second and third counts are equally unsupported. The giving a new bond and security in lieu of a former bond, is not payment so as to support a count for money paid, laid out and expended to the use of the defendant, any more than to support a count upon a special contract when such averment is made. As to evidence of money had and received, it is out of the question. No proof was given on that point.

Foster, contra.

1. As to the bill of exceptions. There are three counts, and it is sufficient if the bond was evidence on any count. The special count only states that *Berkey* was security in a bond in behalf of *Piper* and *Vickroy*, not with him.

2. The law implied a promise from *Morrison* to pay this bond by virtue of the transactions between the parties, and the evidence shewed an express promise to pay it. The jury had a right to infer that *Morrison* had in his hands property to the amount. Giving up the one bond, with a receipt in full upon it, and taking another, on which judgment was entered, was to all intents and purposes a payment.

DUNCAN J. delivered the opinion of the Court.

The first count in this declaration, has been properly abandoned by the defendant in error. The evidence demurred to, did not tend to maintain the special contract. A jury could not have reasonably inferred the facts from the evidence. He rests his case on the money count, for money paid, laid out, and expended, for the use of the plaintiff in error.

The main question is, could the receipt by *Kimmel*, of the bond of *Berkey* and *Reed*, received in payment and satisfaction for the bond of *Vickroy*, *Piper* and *Berkey*, which *Morrison* had bound himself to *Vickroy* to pay, and the judgment and levy thereon, but on which no money had been actually levied, support the allegation of money being paid by *Berkey*, for, and on account of *Morrison*.

The demurrer to evidence is to be taken most strongly against him who demurs; and where it is to circumstantial evidence, his adversary may refuse to join in the demurrer,

unless every fact is distinctly admitted on record, and every conclusion which the evidence offered, conduced to prove. So if the evidence conflict, the party demurring must admit that of his adversary to be true, so far as it conflicts with his own. Where he does join, the Court act on the same principles, and may draw any conclusion which a jury, justifiably, might draw; but ought not to make forced inferences, where there is nothing from which they can be drawn.

It is impossible here to infer, that the plaintiff below paid any money on the transaction on which he predicates the liability of *Morrison*. There is no spark of evidence of an express promise of any kind by *Morrison* to *Berkey*. A moral obligation is a sufficient consideration to support an express promise, but will not raise an implied one. The legal obligation of *Morrison* to *Berkey*, is supposed to be founded on *Morrison's* covenant with *Vickroy*, to discharge the original debt of *Vickroy* and *Piper*, whose surety *Berkey* was to *Kimmel*, and on the parol promise of *Morrison* to *Kimmel* to pay it, and on the principle that *de facto Morrison* became the debtor of *Kimmel*, with *Berkey* still remaining bound to *Kimmel*, and that *Berkey* having satisfied this debt is entitled in his own name to this action against *Morrison*, as a surety, having a right to all the means which *Vickroy* had against *Morrison*, on his covenant with him, or which *Kimmel* had on his express promise to pay this debt; and that by all this evidence, this becoming the proper debt of *Morrison*, which *Berkey* was bound in law to pay, and which he has satisfied, *Morrison* is liable over to him as if he had actually paid the money.

However just the general principle is, that where one comes under an obligation to pay the debt of another, and does pay it, he may recover over, the Court refrains from giving an opinion how far this principle would apply to this case and these parties; because the allegation is, not that he entered into a new liability, or that he gave a new bond with security to pay the debt of *Morrison*, which was received in satisfaction of the former, which bond had been put in suit, and he damnified by it, but that he actually paid the money on account of *Morrison*.

In all actions on general money counts, for money lent to defendant, or laid out on his account, or received by him for

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the plaintiff, the technical rule is, that it must be proved according to the allegation. A specific article, or security advanced for another, is not money paid on his account. The new security given here for the defendant's debt, is not money, nor the current representative of money; it is a security, and nothing more, until it is actually paid. It is now too well settled, to be debated or called in question, that a contract for a specific thing, as stock, or specific security, is not the same as money, and cannot be recovered as such. *Nightingal* v. *Devisme*. 5 *Burr*. 2592. In this form of action, a surety *qua surety*, cannot sue the defendant until he has actually paid the money, though he may have been sued and judgment against him. *Powell* v. *Smith*, 8 *Johns*. 192. The furthest Courts have gone is, where a negotiable note, or bill of exchange has been given and received in satisfaction for the debt of another. This will support the count for money laid out and expended. *Cumming* v. *Hackley*, 8 *Johns*. 156. But the giving any other surety will not. This has been decided on the principle of negotiable paper, being the representative of money; but a bond has no analogy to cash. As between the obligor and the obligee, the receipt of one security as payment of another, given and received in satisfaction, will discharge the first.

The judgment and execution on the bond of *Berkey* and *Reed*, does not prove that the money was paid, and all conclusion of payment is excluded A jury could not presume it from the judgment and levy. The Court cannot infer it contrary to the evidence of the plaintiff, which is, that it was not. The judgment in this demurrer should have been entered for defendant below, because a bare liability to pay the debt of another, whatever cause of action it may afford, could not give the same action, as an actual payment on his account. It is clear, that evidence of a liability to pay money on account of another, is different from the allegation that he has paid it. The grievance is different. The advance of a specific article, on account of another; security given for another; the Court are of opinion, will not maintain a count for money paid for him. To recover on a general count for money paid, it should appear to be money actually and necessarily paid to the party's use. There must be an actual advance of money. It has not been considered neces-

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sary to give any opinion on the admission of the bond in evidence, on which a bill of exceptions was filed. As the Court are of opinion, that if it was properly received, the judgment ought to have been for the defendant below. Had this cause been sent back to the Common Pleas, on the award of *venire facias de novo*, it would have been the duty of this Court to have decided on the exception.

The Court will hereafter direct the mode of entry of the judgment.

The Court directed the entry.—Judgment reversed, and judgment to be entered for defendant below, the plaintiff in error.

Judgment reversed.

CUNNINGHAM *against* IRWIN.

IN ERROR.

Monday, September 17.

ERROR to the Court of Common Pleas of *Allegheny* county.

A rule for taking depositions on reasonable notice is good, if such be the practice of the Court.

This was an action brought in the Court below by *Sarah*

In a suit for necessaries found for the defendant's wife, after evidence given of the marriage, of their living apart without suspicion that they were man and wife, and of a libel by the wife for a divorce, evidence is admissible on behalf of the plaintiff to shew that the wife had solicited the husband to receive her again as his wife, and had offered to return and live with him as such, and he refused to receive her.

And this evidence is admissible whether the offer were made before or after the libel for a divorce: for if after, it will be presumed that the offer embraced an intention to discontinue the libel.

In such suit the plaintiff may give evidence to prove the health, general conduct, and means of living of the wife, during the separation and prior to the time when the plaintiff furnished her with necessaries.

The husband is not exempted from liability for necessaries furnished to his wife, pending a libel by her against him for a divorce.

The husband is liable for necessaries furnished his wife during her separation from him, though it was by her agreement, if she offer to return, and he refuses to receive her, and has furnished no means for her subsistence.

Such necessaries must in such case be agreeable to the rank and condition of the husband: and the husband is liable not merely for the difference between the sum earned by her labour, and the amount of her necessary expenses; he must support her himself or pay those who do support her in a reasonable manner.

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Irwin against *Nicholas Cunningham*, to recover for necessaries furnished to *Mary Magee*, who was alleged to be the wife of the said *Nicholas Cunningham*. It appeared in evidence on the trial that *Nicholas Cunningham* and *Mary Magee* had lived separate from each other for twelve or thirteen years in *Pittsburg*, after their arrival from *Ireland* without any suspicion being entertained that they were husband and wife. *Nicholas Cunningham* was engaged in business and represented to be in good circumstances. *Mary Magee* lived at different places, and at times maintained herself by her labour, but in consequence of sickness she was not always able to do so. In the summer of 1817, she went to board with the plaintiff *Sarah Irwin*. Evidence was given to prove the marriage in *Ireland*, and also that in the summer of 1817, *Mary Magee* filed a libel in the Court of Common Pleas of *Allegheney* county, against *Nicholas Cunningham* for a divorce from bed and board, and for alimony, the record of which was produced.

On the trial, the plaintiff offered in evidence the depositions of *John Magee* and *Patrick Magee* taken *ex parte* under a rule of Court, on six days notice. The defendant objected to these depositions, because the six days notice was not specified in the rule of Court, but it was entered for taking the depositions on reasonable notice. The Court however admitted the depositions, and the defendant excepted.

The plaintiff also offered the deposition of *Samuel Douglas*, that to the best of his recollection and belief, some time *early in the year* 1818, *Sarah Irwin*, widow, and *Mary Magee*, both of *Pittsburgh*, called upon him to act, as the attorney and counsel of the said *Mary*, and to procure for her some arrangement or agreement to be made between her and her alleged husband *Nicholas Cunningham*, merchant of the same place. The deponent, to the best of his recollection, asked her, what arrangement she wished made, or what sum of money she would take to remain as she was, and live apart from *Nicholas Cunningham*. To which she replied, that money was not her object, and that the only thing she wanted was to go and live with him, and be treated as his wife, and that she would on her part conduct herself towards him

as she had done before their separation. Some time shortly afterwards, deponent waited on Mr. *Cunningham*, and made known to him the purpose of waiting on him. He said that for her to live with him, was out of the question, that her claim was very stale, and that he was not bound either in justice or law, to take her or maintain her; but rather than have himself exposed in Court and publicly by any suit, he would give her some money; but if he did, she must leave the country; and that whatever money he would agree to give should be in full of every demand or claim she had against him. That he made this offer for the purpose of preventing exposure and future trouble, and expense. The deponent had frequent interviews with him, and the sum he at last offered, was to the best of deponents recollection, *one thousand dollars*, which should be received by trustees, for her use, or in some such way as his counsel Mr. *Baldwin* would think him safe to act, and by which a final determination would be put to *her claim*, which was then pending in the Common Pleas of *Allegheny* county, and brought by *William Foster* and deponent, by a libel or petition from her for a divorce and alimony. He at some interview between him and deponent, stated, that the said Mrs. *Irwin* had a claim against him for boarding the said *Mary*, but that he had never in any manner agreed with Mrs. *Irwin* for her boarding, and that whatever sum of money he would give should as already stated, be received in full of all claims or demands on account of the said *Mary Magee*.

This deposition was objected to by the defendant, but admitted by the Court, who sealed another bill of exceptions.

The plaintiff also offered in evidence, the testimony of *James Riddle*, to prove, that in the summer of 1817, before the suit for a divorce was commenced, *Mary Magee* informed him of her situation: desired him to call on *Nicholas Cunningham*, and request him to take her back as his wife; and solicited him as *Cunningham's* friend, to speak to him for her. That he did call on *Cunningham* to effect a reconciliation but he refused to accede to it. This evidence was also objected to by the defendant, and admitted by the Court, and a third bill of exceptions was taken.

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The plaintiff further offered in evidence, the testimony of Mrs. *Dunning*, to shew that *Mary Magee* was infirm in health before she went to reside with Mrs. *Irwin;* that she was in a destitute condition, and that her character and conduct were good. To this evidence the defendant objected, but the Court admitted it, and the defendant tendered a fourth bill of exceptions.

Exception was also taken to certain parts of the charge of the Court, which was as follows:

If you shall be of opinion that there was a marriage subsisting at the time the boarding was furnished, then arises the second question for your consideration. Has the plaintiff made out by proof the other facts necessary to render the defendant liable to her in this action?

Generally speaking, the husband, during coverture, is liable for necessaries furnished to his wife. This liability depends upon other circumstances, than the mere marriage, and is subject to certain restrictions and exceptions.

These necessaries should be suitable to the rank and estate of the husband, in other words according to the condition of the parties in life. Clothing, medicine, boarding and lodging, come under the meaning of necessaries.

Whilst the husband, and the wife live together, that is, during cohabitation, although the conduct of the wife may be lewd and criminal, *the husband is bound to find her in necessaries.* If he neglects or refuses to do so, a contract by her for that purpose would be binding on him; because his assent and promise are presumed from the fact of cohabitation. The domestic duties of the wife, the comforts and happiness arising from her society, form the consideration for this liability.

If the wife goes off with an adulterer, the husband is not liable, although the tradesman may have trusted her for necessaries without any knowledge of such criminality. And further, if she quit, or separate herself from her husband, although not with an adulterer, and without criminality, the husband is not liable for her debts, because the consideration for such liability has ceased, and because all persons supplying necessaries to a *married* woman, living separate and apart from her husband and family, are bound to make inquiry as

to the cause and circumstances of the separation; or they give credit at their peril; and if they do give credit, they must take care, and it will be incumbent on them to make out and prove the facts, necessary to render the husband liable to an action.

If the husband and wife *agree* to separate, and he gives and pays her a *separate maintenance*, he is not liable for her contracts for necessaries. The person who trusts her does it at his peril, and without the liability of the husband to an action.

Again, if the wife goes off voluntarily, and of her own accord remains separate from the husband; and particularly if under such circumstances, she labours for and supports herself under the character of a single woman, the husband is not liable for her debts for necessaries.

Again, when they consent to live separate, and she by her labour earns a livelihood, the husband is not chargeable; and this is particularly the case, when there is reasonable evidence that the plaintiff had a knowledge of these facts.

It is the marriage, the cohabitation, the reputation of husband and wife, which gain with the public the credit for the wife.

I have now mentioned some of the exceptions to the general rule, that husbands are liable for the necessaries of the wife.

It is then to be inquired, in what case is the husband liable, when he and his wife live separate from each other.

If there has been a previous cohabitation, and of course the reputation of husband and wife, and he turns her off, without any act of criminality, he is liable for debts which she may contract for such necessaries as I have mentioned. By the previous cohabitation and his turning her off, he gives her a general credit for necessaries; and he, being the wrong doer, cannot prevent her from being supplied with proper articles for her support.

It is the same, if the husband by ill treatment, and cruelty renders the situation of the wife unsafe under his roof. This will be tantamount to turning her out of the house, and giving her a general credit.

Again, if husband and wife have been living separate, without any adulterous behaviour on the part of the wife,

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and she makes a fair and sincere offer to return and cohabit, and he refuses to receive her, he becomes liable for necessaries furnished her from the time such offer to return was made. Of course the law means that this offer should be made in sincerity and truth, and not for any unfair purpose; not for the purpose or with the intent of laying a foundation for any suit for herself or for others; or as matter of form, or with the design of being better enabled to carry on any libel, for a divorce or any judicial proceeding.

If you infer cohabitation from the facts of their leaving *Ireland* together, and crossing the *Atlantic* together in the same ship, although that cohabitation may have terminated when they left the vessel, and may not have existed after they set foot on shore in this country, yet, if the wife afterwards, in sincerity and truth, offers to return and cohabit, and is rejected by the husband, he would be liable from that time for her necessaries. And this would be the case whether he had forced her away, or induced her to depart by some interested design or false practices; or whether they had separated by consent for some temporary purpose, such as concealing their marriage, or avoiding the displeasure of friends, and no separate maintenance was allowed and paid.

We have spoken to you, and you have heard much said of the cohabitation of man and wife. Upon this subject, it seems to become necessary to say a word or two; by speaking of it as we have done in this particular kind of action, we do not mean to tell you, that it is necessary to give validity to a marriage, or indispensably necessary to secure certain conjugal rights to the wife. This, you will observe, is not an action by the wife herself to recover any of her marriage rights, but it is an action by a *third person*, a stranger, to recover money from the husband, on the ground that she has been induced under particular circumstances to credit the wife. In such a case, it becomes material to inquire about the cohabitation and reputation of man and wife; because these are the facts, connected with other acts of the husband, such as turning her off, &c., which render the defendant liable.

Now how do these principles of law bear upon the case before us? I take it they come to this position. If you believe there was a marriage, and that the parties cohabited, and lived

together, and that the defendant turned off his wife, he is liable for such necessaries as have been furnished. Or if you believe that the wife in this case separated herself from her husband without criminality, and had made a true, sincere offer to return and cohabit, he is liable from the time of such offer to return.

It will be for you to decide; but viewing the facts as we do, no such cohabitation and expulsion appear to be proved as will render the defendant liable. Then how is the case, as to the offer to return? You will reflect whether it was made, when made, and in what spirit, and under what circumstances? (Here the Court introduced and spoke of the testimonies of Mr. *Douglas*, Judge *Riddle*, and the circumstance of the libel for the divorce having been signed by the plaintiff, as the next friend of *Mary Magee*.)

There is another point which arises out of this case, and which is based on the following principle of law.

When the husband turns away or leaves his wife, a general notice or prohibition in the newspapers against persons trusting her, will not avail him, or save him from being liable for her contracts for necessaries. But although in such case, he may be responsible for her support and for necessaries, yet he may give notice to any particular person, not to trust her. Otherwise the wife might be putting the husband in the power of his enemy.

Now if the plaintiff took *Mary Magee* into her house, with a notice from the defendant not to take her, nor to trust her, or with a notice from him, that he would not pay, that she would be obliged to resort to a suit, that he looked upon her as his enemy and persecutor: she does it at her own peril, and cannot resort to him.

And lastly, if the husband and wife have never cohabited in this country, and agreed for some private reasons, best known to themselves, to live apart as single persons, and conceal their marriage; say too, that such concealment proceeded from a fear of displeasing their friends, any one who trusts her, does it at his peril, and the husband is not liable.

Was there an agreement to conceal the marriage in the present case? Under what circumstances and for what reason did it exist? These facts and the others arising out

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of this case, you will decide according to your own inferences and conclusions from the testimony.

If the plaintiff is entitled to recover, you will also decide whether the boarding was according to the rank and condition of the husband in life, and what sum the plaintiff is reasonably entitled to have for the same.

And the Court further charged the jury, in answer to certain propositions submitted by the counsel for the plaintiff and defendant, that the application for a divorce would not of itself relieve the husband from his liability for necessaries; that the parties continue to be husband and wife up to the time of the final decree, dissolving the bands of matrimony; that she might offer to return and cohabit, pending the libel for the divorce, and such offer, if made in sincerity and truth, and with a real desire to return, would be available as under other circumstances, to charge him for her necessaries; and that it was for the jury to decide, upon the nature of this fact, the offer to return, with what intent and sincerity it was made.

Baldwin, for the plaintiff in error.

1. The depositions of *John* and *Patrick Magee*, were improperly received in evidence. By the 53d rule of the Court of Common Pleas of *Allegheny* county, a rule to take depositions, is of course, and may be entered by either party in the prothonotary's office, "stipulating a reasonable notice to the adverse party." This reasonable time ought to be expressed in the rule at the time it is entered, the number of days should be specified; this is obviously the intention of the general rule. It is true the prothonotary had entered many rules in the way the rule was entered in the present case: but the practice has not been uniform: indeed the practice of the office was, in general, loose, and the rule ought now to receive a construction conformable to its intention, and calculated to guard against inconvenience and surprise. If the number of days may be left to the party's choice at the time he gives notice, he may manage it so as to have the depositions taken in the absence of the counsel acquainted with the cause, and alone competent to conduct the cross examination. In fact, these depositions were ta-

ken in the absence of the defendant's counsel. The manner of taking *ex parte* depositions is of great importance, and should be regulated by certain and precise rules.

2. The deposition of *Samuel Douglas*, ought not to have been received. It went to prove that the defendant's wife, who went by the name of *Mary Magee*, offered to return to her husband, while a libel for a divorce, filed by her, was proceeding. This offer was altogether irrelevant. It was after the time when she went to Mrs. *Irwin*. It was inconsistent with the libel for a divorce, which she made no offer to withdraw or discontinue. He cited the Act of Assembly of the 26th of *February*, 1817, (*Purd. Dig.* 130,) and 1 *Yeates*, 78.

3. The evidence of *James Riddle* should have been rejected. The offer proved by him was not an absolute offer, such as should have been received in evidence.

4. Mrs. *Dunning* was offered to prove nothing material. The situation and health of *Mary Magee*, previous to her coming to live with Mrs. *Irwin*, were of no importance.

5. The charge of the Court was exceptionable. The Court ought to have charged, that the offer of the wife to return to her husband, was inconsistent with her suit for a divorce. They ought also to have charged, that the husband was not liable during the pendency of that suit. The Court erred in saying, that if the wife made a sincere offer to return, the defendant was liable. Another thing was requisite, namely, that a necessity existed for furnishing board, &c., to the wife. Perhaps the wife had means of her own for support, and in that case, the husband was not liable for necessaries furnished to her: at all events, *M. Magee* was entitled to be supported only according to the rank she had lived in, and not as the wife of the defendant.

Hopkins, contra.

1. For a number of years past, the practice of the office has been to enter rules for taking depositions in the manner the rule was entered in the present case. The party taking the rule gives notice at his peril, and if the time he allows is unreasonable, he loses his depositions. The same witnesses who were examined on the rule in this case, were carefully examined in the suit for a divorce.

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2. As to the deposition of Mr. *Douglas*. The marriage had been proved, before this deposition was offered. The objection is, that the offer to return was not made by *M. Magee*, till after the commencement of the proceedings in the libel suit. But if the fact be so, the offer to return is impliedly an offer to discontinue the libel for a divorce, the ground of which was a malicious desertion by the husband.

3. The evidence of Mr. *Riddle* was excepted to on the same ground as Mr. *Douglas's* deposition, and the same answer may be given.

4. Mrs. *Dunning's* testimony was proper, because it went to shew the state of *M. Magee's* health, her inability to earn a living, and her poverty.

5. As to the charge of the Court, it was very favourable to the defendant. If the wife even elope, and offer to return, and the husband refuse to receive her, he becomes liable for necessaries furnished her. 12 *Johns.* 295. So where there is a separation by agreement, and separate maintenance, if the maintenance is not paid, the husband is liable for necessaries.

The opinion of the Court was delivered by

TILGHMAN, C. J.—This is an action brought by *Sarah Irwin*, the plaintiff below, against *Nicholas Cunningham*, for board and necessaries furnished by the plaintiff to *Mary*, the wife of the said *Nicholas*. On the trial of the cause, several exceptions were taken by the defendant's counsel, to the opinion of the Court, on points of evidence, and an exception also to the charge of the Court.

1. The first exception was, to the admission of the depositions of *John* and *Patrick Magee*, taken *ex parte*, under a rule of Court, on six days notice. The objection is, that the six days notice were not specified in the *rule of Court*. The rule was entered for taking the depositions *on reasonable notice*, and then the plaintiff gave notice to the defendant, that the depositions would be taken at a certain time and place, (allowing six days.) As the same point arose, in the case of *M'Connell* v. *M'Coy*, which was decided this term, it will be sufficient to say, that under that decision these depositions were good evidence. I will barely add, that this Court was induced to admit the depositions, for two reasons. One,

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that the general practice of the Court of Common Pleas for several years past, has been, to enter rules for taking depositions, in the manner this rule was entered; the other, that the party to whom the notice is given, is not injured by it; because he receives actual notice of the time and place of taking the deposition, and if the time is unreasonably short, he may avail himself of that circumstance, on a motion to suppress the deposition, or perhaps by application to a Judge out of Court, to have the time enlarged, on satisfying him that it is unreasonable.

2. The next exception was to the admission of the deposition of *Samuel Douglas;* because the matter contained in it was irrelevant. To comprehend the force of this objection, it will be necessary to consider the nature of this action, and some of the circumstances attending the plaintiff's case. I have said before, that the ground of the action was, board and necessaries found for the defendant's wife. Before *Douglas's* deposition was offered, evidence had been given to prove the defendant's marriage. Evidence had also been given of a libel by the wife for a divorce, on account of the husband's desertion of her. It was a very singular case. The defendant and his wife, (if she was his wife,) came from *Ireland* many years before the commencement of the suit for divorce, and had lived separately in *Pittsburg*, without the least suspicion of their marriage. Consequently it was incumbent on the plaintiff, to shew that under such mysterious circumstances, the defendant was liable for necessaries furnished to his wife; and particularly that the wife was willing and had offered to live with him, for there was no proof that he ever used her ill, or turned her out of his house. The deposition of *Douglas* went to prove, that he was employed by Mrs. *Cunningham*, (who was known by the name of *Mary Magee*,) as counsel, and informed by her, that the only thing she wanted, was "*to go and live with her husband, and be treated as his wife, and that she would, on her part, conduct herself towards him as she had done before their separation;*" and that shortly afterwards, he waited on the defendant, and informed him of Mrs. *Cunningham's* wish to live with him, who answered that her living with him was out of the question, that her claim was a stale one, that he was not bound in law, or justice, to take her, or maintain her,

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but rather than have himself exposed publicly by a suit in Court, he would give her a sum of money provided she would leave the country. This evidence was certainly very material, as it tended to remove a main obstacle in the way of the plaintiff's case, and to explain the doubt, whether the living separately was the fault of the husband or the wife. It is not quite certain, whether Mrs. *Cunningham's* conversation with Mr. *Douglas*, and his communication to the defendant, was before, or after, the filing of the libel for a divorce, but that is immaterial, as I shall shew, when I come to consider the exception to the charge of the Court. I have no doubt therefore, that *Douglas's* deposition was evidence.

3. The third exception was to the evidence of *James Riddle*, esq. I am very clear that this evidence was legal, and highly material to the plaintiff's cause. For Mr. *Riddle* proved, that before the commencement of a suit for a divorce, Mrs. *Cunningham* informed him of her situation, and her earnest desire to be restored to her husband, and solicited him to use his influence as a friend of Mr. *Cunningham*, to effect a reconciliation, and that he did endeavour to effect it, but to no purpose.

4. The fourth exception was to the evidence of Mrs. *Dunning*, who proved the situation of Mrs. *Cunningham*, some time previous to the period of her boarding with the plaintiff. The objection to the evidence, is, that her situation *at that time*, was immaterial. But I do not think so. It was not immaterial to shew the general state of her health and behaviour, and particularly that she had no known means of living, but by her own labour. In a question of this kind, where the blame of a separation is attempted to be thrown on the wife, considerable latitude should be allowed to the evidence, in order to shew her general conduct, and manner of life, during the separation. I am of opinion, therefore, that there is no ground for this exception.

As to the charge of the Court, it certainly was, upon the whole, extremely favourable to the defendant. But there are one or two points, on which his counsel has raised objections. The principal one is, that the husband was not liable for necessaries furnished to his wife, *during her suit for a divorce.* But why not? Was she not his wife, until the decree of divorce was pronounced? And if she was, why

should he not support her? Consider the basis of the libel for divorce. *Desertion by the husband.* If she was deserted, was she to be reduced to the alternative of perishing, or subsisting on charity? What principle of law, or justice, absolved the husband from the duty of maintaining his wife, during a separation for which she was not to blame? Was any fund provided by him for her support? None at all. But the cause of separation, it is said, was a mystery. Perhaps it was voluntary on both sides. But even if it were, and no means of support were provided for the wife, no agreement of hers would discharge her husband from the expense of supporting her, if she requested to come back, and he refused to receive her. Whether she did so request, was submitted to the jury, with remarks on the evidence, by the Court, not only impartial, but very indulgent to the defendant. The jury were told to pay no regard to the wife's offer to return, unless they were satisfied that it was made in sincerity, and good faith, without any view to trick or artifice. But the defendant's counsel have contended, that the suit for divorce, and offer to return, were inconsistent. It would certainly be inconsistent to offer to return, and at the same time persist in the suit for divorce. But there would have been no inconsistency in offering to return, and discontinuing the suit, if the offer were accepted. And that such was the intention, as to any offers made, *pending the suit*, must be presumed. For no woman in her senses could expect, or wish for, a divorce from the bond of marriage, founded on the desertion of her husband, at the moment she was living with him. Nor if she had wished it, would any Court have been so absurd as to decree it. But in this case, there was no encouragement to discontinue the suit, because all the offers of the wife, to return to her husband, were promptly and peremptorily rejected. I perfectly agree, therefore, with the opinion of the President of the Common Pleas, that the defendant was liable for necessaries, until the decree of divorce was pronounced.

Another objection to the charge of the Court was, that the jury were not told, that the husband was not liable for necessaries, if the wife had means of supporting herself. I must remark, that it does not appear by the record, that the Court was requested by the defendant's counsel, to give any

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opinion on that point, nor do I perceive that it arose out of the evidence. For there was no evidence of the wife's having any property of her own, but the contrary. The jury were fairly told, "that the necessaries should be suitable to the rank and estate of the husband, in other words, according to the condition of the parties in life." And, that "clothing, medicine, boarding and lodging, come under the meaning of necessaries." And undoubtedly so is the law. I do not see how it could have been laid down more accurately. If the wife, during great part of her separation, had laboured hard for subsistence, and lived in a rank inferior to her husband's situation, that was no reason why she should not be supported agreeably to his situation, when she offered to return, and he refused her. Nor had he a right to say, that she should earn all she could by her labour, and he would only be answerable for the difference between her earnings, and the amount of the expenses necessary for her support. Such is not the law of husband and wife. The husband must support his wife himself, or pay those who do support her in a reasonable manner, and of that the jury are to judge. Upon the whole, I am of opinion, that there was no error in the record, and therefore the judgment should be affirmed.

Judgment affirmed.

Monday, September 24.

SMITH *against* the executors of MERCHAND.

If the release required by the Act of 24th March, 1817, to be made previous to a recovery of money paid by a purchaser at a sale for taxes, do not appear to have been made to the real owner, but is to the original warrantee; on a demurrer to evidence, such original warrantee will be presumed to be the real owner.

The Act of 29th March, 1817, authorising the recovery of certain money in the hands of commissioners, was not an Act dissolving a contract without the consent of parties.

ERROR to the Court of Common Pleas of *Westmoreland* county.

This was an action brought by the executors of *David Merchand,* the plaintiffs below, against *Jacob Smith*, late

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one of the commissioners of *Westmoreland* county, for the recovery of a sum of money, paid by the said *David* to the said *Jacob*, while a commissioner as aforesaid, on account of sundry tracts of land sold by the commissioners of *Westmoreland* county, and purchased by the said *David*. The action was founded on an Act of Assembly, passed the 24th of *March*, 1817, entitled "an Act authorising the recovery of money in the hands of certain commissioners." By this Act it was enacted, that the purchasers of any lands sold at commissioners' sales for taxes, previous to the year 1800, or their heirs, executors or administrators should be authorised to recover any sums of money, paid to any commissioner, beyond the amount of the taxes and costs, for which such lands were sold, and which had not been paid by the said commissioners to the real owner of such land, or into the county treasury: *provided*, that before suit commenced, a bond of indemnity with sufficient sureties to such commissioners, should be tendered, and a release of all interest in or title to such lands under such sale, be duly executed by such purchasers, or by their executors or administrators, (who were authorised by the said Act to execute such deed,) and to be recorded in the office of the recorder of the county, in which such sales were made. (See *Pamph. Laws*, 174.)

The plaintiffs, in support of their action, gave evidence of the sale by the commissioners of *Westmoreland* county, of sundry tracts of land, of which *David Merchand* became the purchaser, and the payment by him to the defendant, one of the commissioners, of the sum of 567 dollars, beyond the amount of the taxes and costs, for which the lands were sold. They also gave evidence of a bond of indemnity with sureties, executed by them, and tendered to the defendant, and of a deed of release from themselves to the persons in whose name the taxes were laid, and as the property of whom the lands were sold, duly executed and recorded in the office of the recorder of *Westmoreland* county, before the commencement of this suit. To this evidence, the defendant demurred, and the Court below gave judgment for the plaintiffs.

Forward, for the plaintiffs in error, urged several reasons in support of the demurrer.

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1. The deeds from the commissioners were not produced.
2. The release is to the person, as whose property the land was sold. The true owner is not always indicated by the name of the person, as whose property the land is sold.
3. The Legislature had no right to vacate a contract. It is not to be presumed that the commissioners' sale was void, or that the owner of the land considered it as void.

Alexander, contra.

There was no contract between the original owner and *Smith*, because, when the sale was made, in 1796, the commissioners had no power to sell more land, than would pay the taxes.

The opinion of the Court was delivered by

TILGHMAN, C. J.—The counsel for the plaintiffs in error, has relied principally on two points. 1st. That the release does not appear to have been made to the proper persons: the commisioners often take for granted, that the lands belong to the persons for whose use the original warrants issued, whereas very often, such warrantees are not the owners at the time of the sale for taxes. The answer to this objection, is short and decisive. The demurrer confesses every thing, which the jury might have inferred from the evidence, and when taxes are laid on land, as the property of the warrantees, and they are sold as such by the commissioners; this is *prima facie* evidence of property, and the jury may infer, in the absence of all other evidence, that the property was in such warrantees. The 2d point made by the plaintiff in error is, that the Act of Assembly, on which this action is founded, was void, because it dissolves a contract without the consent of the parties. But this does not appear to be the fact. The parties to the commissioners' sale, were, the commissioners and the purchaser. The commissioners were but trustees, for the benefit of the public, appointed under the authority of the Legislature, and subject to their controul. They pretend to no private right. There was therefore no invasion of any right of theirs. And as to the other party, *the purchaser*, his consent is proved by the bringing of this suit, which is founded on a dissolution of the contract. The truth is, that this Act of Assembly was very salutary; it corrected a great public abuse.

Most of these commissioners' sales were void, because not conducted according to law; and the owners of the land, knowing them to be void, would not receive the money paid by the purchasers, beyond the amount of taxes and costs; consequently this money remained in the hands of the commissioners, *to their private benefit.* The Act of Assembly was made to authorise the recovery of this money, and is confined to cases, in which sales had been made previous to the year 1800, that is, at least seventeen years before the passing of this Act. Now, surely when the money had lain thus long in the hands of the commissioners, without demand by those persons who had been the former owners, it was sufficiently evident, that these persons considered the sale as void, and never intended to demand the money. Besides, these former owners were no parties to the contract of sale, and no contract of theirs was violated, by dissolving that contract. But, even if they had any subsisting right under that contract, it is not taken away by this Act of Assembly; on the contrary, the Act provides, that before the plaintiffs could recover against the commissioner, they should give him an indemnifying bond. But, if it should ever happen, that a suit should be brought by the person, whose land was sold for taxes, against the commissioners for the surplus received by them, beyond the amount of taxes and costs, (an event extremely improbable, as it could only be, when the land had been sold by the commissioners, for *more than its value*;) it would be difficult to support the action, against the strong presumption arising from an acquiescence of seventeen years. Be that as it may, however, it is the opinion of the Court, that the Act of Assembly violated no contract against the consent of any person, whose consent was necessary, and was therefore valid. The judgment of the Court of Common Pleas is to be affirmed.

Judgment affirmed.

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Monday, September 24.

APPEAL.

The testator devised to his wife E., all the tract of land on which he lived, for her life, she committing no waste therein: and bequeathed her one hundred pounds in money, and specific legacies, and then devised as follows, "all which the said E. may dispose of as she sees cause, except the above mentioned tract of land, which said land I allow to be sold after her decease, and the price, with what money may be on hand, and indebted to me, (after paying the following legacies and funeral expenses,) I allow to be laid out in building a Dutch Lutherian Church, where it will be most convenient to this place." His executors received various debts, with the interest up to the time of payment. An Act of Assembly afterwards passed, which directed that the interest on any money thus bequeathed for the building of a Dutch Lutherian church, yet in the hands of the executors, should be appropriated to the maintenance of the widow. *Held*, that the executors were chargeable with the interest actually received by them on the aggregate of debt and interest in their hands, whether such interest was received before or after the making of the Act of Assembly, and that such part of that interest as accrued during the life of E., should go to her or her executors. They were chargeable also with the money not put out, if they used it on their own account.

THIS was an appeal from the Orphans' Court of *Westmoreland* county, by the executors of *Henry Hoffman*, deceased, who settled their administration account in that Court. There were several items of which the appellants complained, but the points to which the consideration of the Court was now directed, were: 1st, Whether the executors were liable to be charged with interest on the money of the testator which came to their hands, and to what amount, and 2d, What share of that interest belonged to *Eleanor Hoffman*, deceased, the widow of *Henry Hoffman*.

These questions depended on the will of *Henry Hoffman*, and an Act of Assembly passed the 28th *March*, 1814, entitled, "an Act for the relief of *Eleanor Hoffman*." *Henry Hoffman* died in the year 1802. He devised by his will to his wife *Eleanor*, all the tract of land on which he lived, containing about 49 acres, for her life, she committing no waste or destruction therein. He also bequeathed to her 100 pounds in money, and a legacy of sundry specific articles, after which he devised as follows. "All which the said *Eleanor* may dispose of as she sees cause, except the above mentioned tract of land, which said land I allow to be sold after her decease, and the price, with what money may be on

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hand, and indebted to me, (after paying the following legacies and funeral expences,) I allow to be laid out in building a Dutch Lutherian Church, where it will be most convenient to this place." There were debts due to the testator by bond and otherwise, which were received by his executors at different times, with the interest due on them up to the time of payment. The Act of Assembly, after reciting the devise to the wife, and the Church, and that "she, the said *Eleanor*, from necessity expended, in improving the premises and other unavoidable expenses, all her share of the personal estate, and is now old and infirm, and the proceeds of the land are in no wise adequate to her maintenance, and that money bequeathed for building the church aforesaid is still in the hands of the executors, uncalled for," proceeds to enact, that "the interest on any money bequeathed for the building of a Dutch Lutherian Church by *Henry Hoffman*, and which is yet in the hands of his executors, shall be and the same is hereby appropriated to the support and maintenance of *Eleanor Hoffman* widow of said *Henry*." It was agreed, on both sides, that the above Act of Assembly was to be considered as valid, and that the executors were bound to place out the money at interest, after that act, and to pay such interest to the widow during her life.

Alexander and *Ross*, for the appellants, contended, that the executors were not liable for interest on the money received by them on account of the debts of the testator, during the period anterior to the passage of the Act of Assembly. The will gives to the church all the money on hand, and the money arising from the sale of the land after the wife's death. There is no direction to put the money out at interest. When the executors are accountable for interest, it is for the benefit of the next of kin only, and not for the benefit of a charity. The executor is a trustee as to the undisposed surplus only for the benefit of the next of kin. *Grasser* v. *Eckhart*, 1 *Binn.* 575. 3 *Binn.* 557. 1 *P. Wms.* 54 *C.* 2 *P. Wms.* 158. 2 *Atk.* 18. 2 *Brown's Ch. Cas.* 654. So the Act of Assembly of the 7th *April*, 1807, provides that the undisposed residue shall be distributed among the next of kin. In *Wilson* v. *Wilson*, 3 *Binn.* 557, where this Court decided, that in *Pennsylvania* the executor was a trustee as to the surplus not disposed of by

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the will, and not the beneficial taker, he was held to be such trustee for the use and benefit of the next of kin. In the present case, the testator died without any known kindred, and, therefore, the interest, if any was received, not being given to the widow or charity, must enure to the executors for their own use. By the Act of 27th *March*, 1813, Sect. 4. 1 *Sm. Laws*, 83, administrators, executors, and guardians are required to put the money of minors out to interest; and by Sect. 6, they are answerable for interest from the time when their accounts are or ought to be settled. No one could call these executors to account, till after the widow's death. As trustees for the charity, they were bound to keep the money ready, and therefore could not put it out at interest. The money was to be paid at the widow's death, and that was uncertain. The motive of the Act of Assembly was, that there was money in the hands of the executors not called for by the charity; that the widow had improved the land at her own expense, and was old and unable to live on the profits of the land. It is presumed, the Legislature thought no interest had been received, as it appears their intent was, that from that time the money should be put out to interest, and the interest paid to the widow. She never demanded any arrears of interest in her life. The Legislature did not intend to take from the charity any thing which belonged to it. Now the whole debt which had been received, principal and interest, belonged to the charity in the event of the widow's death; but still it might lie idle in the hands of the executors, and consequently it was not wronging the charity to order the money to be put to interest, and the interest to be paid to the widow. If the executors put out the money before, it was at their own risque, and therefore they ought not to pay interest.

Foster and *Forward*, contra.

The fund consisting of the debts and interest upon them received by the executors, after the decease of the testator and prior to the death of the widow belonged to the charity, and as accessary thereto the interest received after the widow's death. The interest received by the executors or which they might by proper diligence have made, during her life, belonged to her. There was no surplus undisposed of

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by the will; no residue which could go to any person. By the will, the intention is manifest that the widow was to have the use of the money as well as of the land, which are disposed of in the same clause. The Act of Assembly appropriates the interest on any money in the hands of the executors to the maintenance of *Eleanor Hoffman*, without discriminating whether it accrued before or after the passage of the Act: and its intent appears to be to comprehend both; it was to indemnify her for money expended in improving the land. It is clear that the executors have no beneficial claim to the interest accrued. If the devise to the charity were void, the Commonwealth would take, there being no next of kin. The executor is liable for interest on money in his hands though not directed by the will to be put out to interest. In 7 *Bac. Abr.* 182, it is laid down that a trustee is liable for interest where he has been guilty of neglect in not putting out the money, or where he has made interest by putting it out.

The opinion of the Court was delivered by

TILGHMAN, C. J.—The validity of the Act of Assembly, or of the devise to the church, have not been questioned by either party. The devise of *what money might be in hand or indebted to the testator*, would comprehend all debts due to him, and all interest accruing on those debts to the time of payment to the executors. The interest so accruing could not be separated from the principal. It was to be considered as part of the debt at the time it was paid; it was an accessary which adhered to the principal, and could have had no existence without it. Consequently it could not have been the intent of the Act of Assembly to take that interest from the church. There is no intimation of any such design. The interest given to the *widow* by the Act, was the interest on the money bequeathed to the church, which money bequeathed to the church, was yet in the hands of the executor, and was the aggregate sum of principal and interest which had been paid to the executors by the debtors of the testator. But that aggregate sum had been received by the executors, many years before the passing of the Act, and it is presumed that it had not lain idle. Did the Act intend to give to the widow the interest which had arisen on that money during the time

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it was in the hands of the executors? I think it did. But did it intend to charge them with interest for the whole time it had lain in their hands? In that respect, the Act must be construed as following the law, which, in the present case, would charge the executors with no more interest than they had actually received. In general, the rule adopted by this Court is, to charge the executor with such interest as he has made, or with due diligence might have made, from the money in his hands. But this is an uncommon case. The testator gave no orders to put the money out to interest, and the time when the church would have a right to call for it, depending on the life of an old woman, was so uncertain, that if the executors, from a sense of this uncertainty, had kept the money by them, without using it themselves, I do not think they would have been chargeable with interest. But if they did actually put it out, and received interest for it, or made use of it on their own account, they ought to be charged with what they actually received, if put out; or with legal interest if they used it on their own account, during the time they used it. It was once questioned whether executors were chargeable with interest received by them, on money not directed by the testator to be put to interest. But I take it to be now settled that they are. In 7. *Bac. Ab.* (*Wilson's Ed.*) 182, the cases are collected which affirm that position. And it is highly reasonable, particularly in this Commonwealth, where the executor receives a compensation for his services, and takes nothing by the will but what is expressly given to him. The counsel for the appellants did, indeed, contend, that this interest was in nature of a surplus undisposed of, and therefore should go to the executors, because the testator had no known kin. They supposed that the decision of this Court, by which the executor was held to be a trustee for such surplus, was only in favour of the next of kin; especially as the Act of Assembly of 7th *April*, 1807, enacts, that the undisposed of residue shall be distributed among the next of kin. But the decision of the Court was altogether independent of the Act of Assembly, and grounded upon the custom of the country which took its rise from the law allowing the executor compensation for his care and trouble. In the case before us however, there is no surplus undisposed of. The whole residue, so far as we can perceive, is given to the

church. And the question is, not whether the executors take any thing by virtue of the will, for clearly they do not; but whether they are chargeable with interest, on money not belonging to them while it remained in their hands. Both the law, and the justice of the case require that they should be charged with the interest actually received by them, since the money of the church came to their hands, whether such interest was received before or after the making of the Act of Assembly, and that such part of that interest as accrued during the life of *Eleanor Hoffman*, should be accounted for to her executors. They should be chargeable also, although the money was not put out, if they used it on their own accounts.

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ALLISON *against* RANKIN.

IN ERROR.

Monday, September 24.

ERROR to the Court of Common Pleas of *Indiana* county.

An irregularity in the proceedings in a *scire facias* on a mortgage, as that judgment was entered after the return of one *nihil*, cannot affect the competency of the judgment, or of the Sheriff's sale upon it, when offered in evidence in another suit.

In ejectment by a person who purchased at a Sheriff's sale founded on a judgment in a *scire facias* suit upon a mortgage, such mortgage is evidence, independently of the proceedings in the suit.

Where the plaintiff claims under a warrant and survey, the defendant may give in evidence, a patent from the Commonwealth, containing recitals of title without first shewing that title.

This was an ejectment brought in the Court below, by *Hugh Rankin*, against *John Allison*, to recover 430 acres of land, and three-fourths of an acre, in *Centre* township, *Indiana* county. The plaintiff gave in evidence, a warrant to *William Marshal* for 400 acres, dated the 24th *November*, 1786, and a survey made thereon, on the 13th *January*, 1787, for 430 acres, and three-fourths of an acre. He then offered in evidence, a *scire facias*, issued upon a mortgage to *October* Term, 1789, in which *Hugh Rankin* was plaintiff, and *William Marshal* was defendant, on which the Sheriff returned *nihil* and no terre-tenant. A rule was then taken, on the 23d *November*, 1789, to plead in six weeks or judg-

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ment, and judgment was entered thereon according to the rule. On the 24th *November*, 1789, a *levari facias* was issued, on which the Sheriff returned the land sold to the plaintiff. The plaintiff at the same time offered in evidence, a mortgage from *William Marshal*, dated the 26th *December*, 1787, reciting that *William Marshal* and *Hugh Rankin*, were bound in an obligation to *Colin Campbell*, for the payment of fifty-one pounds, and conveying 225 acres, and three-fourths of an acre of land, to *Hugh Rankin*, conditioned for the payment of the said fifty-one pounds to *Rankin*, in discharge of the debt due to *Colin Campbell*. To this evidence the plaintiff objected, but it was admitted by the Court, and an exception taken.

The plaintiff further offered in evidence, articles of agreement made between *William Marshal* and *Simon Elliott*, on the 14th *February*, 1787, by which the parties stipulated, in consideration of thirty-seven pounds, ten shillings, in hand, paid to *Marshal*, that they should be equally interested in the said land, (except a small portion thereof, which was reserved by *Marshal*,) and *Marshal* was to give *Elliott* a deed for the share that should fall by lot to him, and an assignment made of his interest in these articles by *Elliott* to *Rankin*, on the 24th *November*, 1791. The defendant also excepted to this evidence, but the Court admitted it, and sealed another bill of exceptions.

The defendant then offered in evidence, a patent to the defendant from the Commonwealth, for the land in question, which recited a sale thereof for taxes, by the commissioners of the county, to one *Allison*, and a deed from *Allison* to the defendant. The plaintiff objected to this evidence, and the Court overruled it. The defendant thereupon excepted to the Court's opinion.

Stannard, for the plaintiff in error, contended, that *nihil* was not a good return to the *scire facias*, and if it were, there should have been an *alias scire facias*, before judgment could be entered. This judgment was irregular, and might be considered a nullity. 2 *Binn.* 46. Ejectment would not lie on the articles. At all events the patent was evidence.

Ross, contra, insisted, that the patent was not admissible. It recited a title, no part of which was proved. The Commonwealth cannot make a title for a grantee, so as to divest that of a third person claiming under warrant and survey. If the patent were read, it might happen that the party would not be able to produce the evidence of the title recited, and then it would be altogether irrelevant and useless. Such evidence is, in its nature, primary, and should precede the production of the patent. He cited, 1 *Binn.* 88. 2 *Serg.* & *Rawle*, 280. 450.

The opinion of the Court was delivered by

GIBSON J.—To shew that the title of *William Marshal*, under whom both parties claim, had been vested in the plaintiff below, his counsel offered in evidence, a mortgage to the plaintiff, together with the record of a *scire facias*, and judgment on it, shewing a sale to the plaintiff, and also a deed from the Sheriff of the county: to all which the counsel of the defendant objected, on the ground that there was no legal service on the mortgagor, and that consequently the judgment, which was entered up by default, was irregular. But assuming this to be true, a Court can never inquire into the regularity of the proceedings of another Court, coming collaterally before it: and so far is this principle carried, that a conviction by a justice of the peace having jurisdiction, is, while unreversed, conclusive of the matter adjudicated, even in an action against himself. No alleged irregularity of the proceedings, therefore, could affect the competency of the judgment on the *scire facias*, or of the Sheriff's deed founded on a sale in pursuance of it. Independently of the proceedings, the mortgage was evidence of itself, being a good foundation for an ejectment against the mortgagor, or those claiming under him.

But certain articles of agreement between *Marshal* and one *Elliott*, who assigned his interest to the plaintiff, were offered and objected to. By these it was agreed, that *Elliott*, in consideration of one hundred dollars paid by him, was to have a moiety of *Marshal's* interest, under his warrant and survey. No one can entertain a doubt of the competency of this part of the evidence.

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On the other hand, however, the defendant offered a patent from the Commonwealth to himself, which recited a sale for taxes by the commissioners of the county, to one *Allison*, and a deed from *Allison* to the defendant, which was rejected. The question was not on the competency of those recitals, but whether the patent was evidence at all before the intermediate links were supplied by evidence of the regularity of the commissioners' sale, and by the production of the deed to *Allison*, and also of the conveyance from him to the defendant. I cannot see how this case can be distinguished from *Downing* v. *Gallagher*, 2 *Serg. & Rawle*, 455, where it was held, that the patent was evidence of a grant from the Commonwealth, although it contained recitals of conveyances of an outstanding title, which were clearly incompetent evidence of the facts recited. The only plausible argument against this is, that it would be nugatory to receive evidence which the Court would be bound to inform the jury was altogether nerveless. But was that the character of the evidence in this instance. In *Falkner* v. *The Lessee of Eddy*, 1 *Binn.* 188, it is laid down, that a deed is inadmissible until at least a *shadow* of title is shewn in the grantor. But here was more than a shadow of title in the Commonwealth, for she had the complete legal estate. The patent therefore vested such a title in the defendant, as would enable him to recover at law, against the title which the plaintiff below set up under his warrant and survey, and which, between him and the Commonwealth, or a person standing in her place, was but an equity. The defendant therefore, by shewing that he was invested with her rights, would have put himself in a situation to take advantage of any circumstance that she could have urged against a specific execution of the contract: but this he could not have done without putting himself in her stead; for as to third persons, a warrant and survey, under our usages, I apprehend, confer a legal title. But taking the matter to be otherwise, still a conveyance of the legal estate is one step towards a complete title, and the defendant having read his patent, might possibly have shewn the regularity of the commissioners' sale, and have produced the intermediate conveyances. If he had failed to do this, he would have been

declared a trustee, and the plaintiff would have recovered. But that was a matter for subsequent consideration, and has nothing to do with the question of competency. It is the opinion of the Court, that the judgment be reversed.

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Judgment reversed, and a *venire facias de novo* awarded.

WOLVERTON and others *against* The Commonwealth for the use of HART & Co.

September.

IN ERROR.

ERROR to the Court of Common Pleas of *Erie* county.

In a suit upon a recognisance given by the Sheriff and his sureties, for his official good conduct, the judgment is not to be entered for the penalty, for the use of those interested, but for the damages sustained by the party sueing.

The transcript of a justice not authenticated under seal is not evidence.

This was a *scire facias* on a recognisance, in the sum of 5000 dollars, entered into on the 16th of *October*, 1816, by the plaintiffs in error, defendants below, *Stephen Wolverton*, *Rufus S. Reed*, and *Benjamin Wallace*, to the Commonwealth of *Pennsylvania*, conditioned that *Wolverton* would perform the office of Sheriff, for the county of *Erie*, for the next three years. The *scire facias* was for the use of *Eli Hart* and *John Lay*, trading under the firm of *Hart & Co.*, and was returnable to *December* Term, 1817. It alleged generally a breach of the condition. The defendants pleaded generally that *Wolverton* had well and truly performed all the duties of a Sheriff, faith-

The admission of incompetent evidence cannot be assigned for error, when the fact it was adduced to prove, is afterwards established by other conclusive evidence.

In an action against the Sheriff and his sureties on their recognisance, for a breach of duty in the Sheriff's suffering a defendant to escape, after being in custody; if the plaintiff, after having given notice to the defendant to produce the execution, offer to prove the existence of the execution by parol evidence, and the defendant objects to the evidence, on the ground that a record cannot be proved by parol evidence, and the Court admit the evidence, and the defendant except to their opinion, he cannot afterwards, in bringing a writ of error, avail himself of the objection to the evidence that there was no proof that the execution had come to the Sheriff's hands.

In a suit on a Sheriff's recognisance against the Sheriff and sureties, for his suffering a person in his custody, under an execution, to escape, the insolvency of such person at the time is not evidence.

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fully executed all process, paid over all monies, &c. The plaintiffs replied, setting out a particular breach, that on the 1st of *May*, 1817, a certain *Edwin Forbes* was committed to the gaol of the county, and in the custody of the said Sheriff, by virtue of an execution issued by *George Moore*, a justice of the peace, at the suit of *Hart & Co.* for 117 dollars and 77 cents, on a judgment obtained by confession, pursuant to the Act of Assembly, and that the Sheriff suffered *Forbes* to escape and go at large. The defendants rejoined, denying, that *Forbes* was in custody under the execution, but averring that having applied for the benefit of the Acts of insolvency, he had, at his examination, been committed under those Acts, on a charge of fraud, which the defendants insisted was a virtual discharge of his person, under the execution. The plaintiffs sur-rejoined, that *Forbes* was in custody under the execution, and on this issue was joined.

On the trial of the cause, the plaintiffs offered in evidence a transcript of the judgment of the justice. This was objected to by the defendants, because it was not authenticated under seal, and because the docket itself was the best evidence, and ought to be produced. The Court, however, overruled the objections, and admitted the evidence, and the defendants excepted. The docket itself was afterwards produced and given in evidence by the plaintiffs.

The plaintiffs also offered parol evidence of the existence of an execution against *Forbes*, "having first given notice to the defendants to produce the said execution. The admission of which said testimony was then and there objected to by the counsel of the defendants, *on the ground that a record could not be proved* by parol evidence." This objection was overruled by the Court, and the testimony admitted, and an exception taken by the defendants.

The defendants offered in evidence, the petition of *Forbes*, together with the schedule of his debts, credits and effects, and all the proceedings of the Court of Common Pleas on the petition. The plaintiffs objected to this evidence, and the Court rejected the evidence, declaring, that in the above case of an escape, it is immaterial what the circumstances

of *Forbes* were, whether he was solvent or insolvent; and that it was not now competent to the said defendants to shew the insolvency of *Forbes*, even if they were able to do so; and that the said schedule was irrelevant and inadmissible. To this decision, the defendants excepted. The jury found a verdict for the plaintiffs for the amount due to them by *Forbes*, for which judgment was entered.

This case was argued at the former term, and again at this term, by *Foster*, for the plaintiffs in error, and *Baldwin* for the defendants in error.

GIBSON J. delivered the opinion of the Court on all the points but one. TILGHMAN, C. J. having been absent at the argument, and a difference of opinion having arisen between between GIBSON J. and DUNCAN J., on that point, it was re-argued at this term, before all the Judges.

GIBSON J.—The objection that judgment for the Commonwealth ought to have been entered up for the penalty, to remain cautionary for the use of any one that might have cause of action for the official misconduct of the Sheriff, has not been sustained. The Act of the 28th of *March*, 1803, s. 4. authorises the Commonwealth, or any person aggrieved, as often as the case may require, to institute actions of debt or *scire facias*, on such recognisance: and provides that a verdict and a judgment shall pass for whatever damages shall be proved to have been suffered. This, of course, excludes all idea of there being one judgment for the use of all concerned, as the foundation of a separate remedy for each, by a *scire facias* adapted to the peculiar circumstances of the case. Besides this, there are three points which arise on bills of exceptions to evidence.

The plaintiffs below offered in evidence a transcript of the proceedings and judgment of a justice of the peace, which was objected to for want of evidence of authentication, it not being a record attested by the seal of any officer; and because it was secondary to the docket itself, which, it was said, ought to be produced. The Court admitted the transcript; but the docket, also, was afterwards produced and given in evidence. It is very clear, the transcript was not

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competent: but the error in this respect was cured by producing the docket itself; which brings the case within the spirit of a well established rule, that the admission of incompetent evidence cannot be assigned for error, when the fact has afterwards been established by other evidence, that was conclusive as to its existence.

On the next point, which has been re-argued before all the Judges, in consequence of a difference of opinion between the Judges who sat at the first argument, I do not deliver the opinion of the Court, but my own sentiments.

The plaintiffs further offered parol evidence of the contents of the execution, on which *Forbes*, (for whose escape the suit was brought,) was committed; "having first given notice to the defendants to produce the said execution; the admission of which testimony was then and there objected to by the counsel of the defendants, on the ground *that a record could not be proved by parol evidence.*" The objection in this Court is, that parol evidence was inadmissible *before the execution was shewn to have come to the defendants' possession, or to be lost or destroyed*: and I at once admit that if it had been put on that ground at the trial, it ought to have prevailed. But, I apprehend, there has been a total change of position since the cause came here. The argument, that to avoid the operation of the rule, which excludes parol evidence of the contents of a paper, it was incumbent on the plaintiffs to bring the case within some one of the exceptions to it, and that until they did so, the objection on general grounds was unremoved, is ingenious, but easily shewn to be unsound. It was broadly argued below, *on the abstract principle*, that parol evidence of the existence or contents of a record would be given in *no case*: not that such evidence might be given under some circumstances, but which had not been shewn to exist, and that parol evidence was *therefore* incompetent; but the argument proceeded on the abstract nature of the rule, which was treated as if it were subject to no exception whatever, and of course every thing of that kind was put out of view. Now I take it to be an inflexible rule, and one of the utmost practical value, both in pleading and evidence, that whatever is not denied, or made special ground of objection, is conceded.

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Thus, if a party, being called on for that purpose, opens the particular view with which he offers any part of his evidence, or states the object to be attained by it, he precludes himself from insisting on its operation in any other direction, or for any other object; and the reason is, that the opposite party is prevented from objecting to its competency in any view different from the one proposed. In like manner, a party may be called on to state the particular ground on which he rests an objection to competency, and if it fails him, it is not error to receive the evidence, although it be incompetent on other grounds. Where, therefore, there is a special objection, or, what is the same in effect, a general objection resting not on collateral circumstances, but on the supposed existence of an abstract principle admitting of no exception, as was the case here, every ground of exception which is not particularly occupied, is to be considered as abandoned. For instance: a deposition is offered, and it is resisted exclusively on the ground, that the witness is interested, or that the evidence is irrelevant; would it not be palpably unjust in a Court of error to listen to an objection, that it did not appear there had been proof of notice, or that the deposition had in all respects been regularly taken? If the defect were pointed out in time, it might be supplied by further proof; or if that were impossible, the party would at least be apprised of the danger to ultimate success, which is necessarily incurred by pressing the admission of incompetent testimony. Here, if instead of urging the abstract operation of the rule, the defendants had objected, that the case did not fall within the particular exception to it, now relied on, the plaintiffs might have been prepared to shew that the execution actually came to the hands of the Sheriff, or that it was lost or destroyed; but, as to that, the silence of their antagonists at the trial, had a direct tendency to lead them into a surprise. For reasons like these, I regret a practice, too frequent in the Common Pleas, of stating the exception generally, without specifying the grounds on which it is urged. In such a case, as we cannot judicially know the precise point, the Court was called on to decide, we are obliged to let in any objection that can be raised on the face of the record; and hence, I have frequently been obliged to consent to reverse on points, that, I had

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every reason to believe, were never made below. No Judge ought, in justice to his own reputation as a lawyer, or to the rights of suitors, to allow any bill of exceptions which does not contain the very point decided, and nothing else. The Statute 13 *E.* 1. *c.* 31, says: "where one impleaded before any of the Justices, alleges an exception, praying, they will sign it, and if they will not, if he that alleges the exception writes the *same*, and requires that the Justices will put to their seals, they shall do so; and if one will not, another shall." Then surely the party taking the exception, is bound to write it exactly as he alleges it. But where the precise point is actually stated, I apprehend we are bound to decide it on the ground taken below. In the argument here, the plaintiffs in error are therefore to be confined to the exception exactly as it was proposed at the trial; and as, in the case at bar, the objection was made on a supposed abstract inadmissibility of the evidence, independent of collateral considerations, I am of opinion that the proof of all preliminary facts, which would otherwise have been indispensable, ought to be considered as having been waved.

The last point is the admissibility of evidence to shew that *Forbes* was insolvent, which was offered to shew the extent of the plaintiffs' actual loss from the escape. Such evidence would unquestionably be competent in an action for an escape on mesne process; but imprisonment of the body on a commitment in execution, is, in contemplation of law, full satisfaction of the debt; and a right of which the Sheriff cannot deprive the plaintiff without paying for it, not only its actual, but its legal value. This right is the creditor's property, and cannot be taken from him at a less price than the law has set upon it. Such in this respect is the reasoning of the law, which, though artificial is conclusive. But, although it is conceded, that if the Sheriff alone were concerned, the measure of damages would be the amount of the debt and costs, it is said the same rule does not hold in regard to the sureties who are more favoured by the law. But where a surety is liable at all, he is liable to the same extent as his principal; and to this, I at present recollect no exception. Where, indeed, he is discharged at law by his own death, the obligation being joint, and you come to charge his representatives in equity; or where he is discharged in equity by

the laches or acts of the obligee, although liable at law, the obligation being several; a chancellor may discriminate as to his being chargeable at all: but where he is liable both in equity and law, neither a Chancellor nor a court of law can discriminate as to the extent. On all the points, therefore, I am of opinion, that the judgment be affirmed.

TILGHMAN C. J.—Not having been present at the first argument of this cause, my opinion will be confined to the single point which has been just now argued, and comes before us on a bill of exceptions. It is an action against *Stephen Wolverton*, late Sheriff of *Erie* county, and his sureties on his official bond, founded on a breach of duty, in suffering one *Edwin Forbes* to escape, after being committed on an execution issued by a justice of the peace on a judgment rendered by the said justice. On the trial of the cause in the Court of Common Pleas, the plaintiff offered to prove the existence of the execution, by the oath of *George Kelly*, having first given notice to the defendants to produce it. The counsel objected to the evidence *on the ground that a record could not be proved by parol evidence.* These are the words of the bill of exceptions. The Court overruled the objection, and admitted the evidence, to which an exception was taken on the part of the defendants. I understand from this record, that the only ground on which the evidence was objected to, was, that a record could not be proved by parol evidence. But the plaintiff in error now contend, that the evidence was inadmissible, for want of previous proof that the writ had come to the Sheriff's hands. I do not think that objection now open. It should have been made below, or the plaintiff may be taken he e by surprise. When the defendants specified the cause · their objection to the evidence, they waved all other causes. Had this objection been made then, the plaintiff might have proved that the writ had come to the Sheriff's hands. It is not like the case put by the defendants counsel, of a good exception supported by a bad argument. There, to be sure, if the exception be good, it must prevail; because, where a case admits of many arguments, the offering of a bad one at first, is no objection to a better afterwards. The question is, whether the principle be just; and not whether it was supported by good or

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bad argument. But the present is a case, in which the defendants might have founded their objection, either on one general legal principle, or on several independent matters of fact, and they had their option to rely on the whole, or any one of them, provided the plaintiff was informed of the matter which he had to answer. The defendants might have objected to this parol evidence, either on the general principle that no parol evidence is admissible to prove a record, or that it was not admissible unless the plaintiff proved two previous facts, *viz.* that the execution had come to the sheriff's hands, and that the plaintiff had given him notice to produce it; or they might have objected for any one of these reasons. But if their objection was confined to one reason, below, they should not be permitted to resort to any other here; because by so doing they would take the plaintiff by surprise. When the plaintiff after proving notice to the Sheriff to produce the execution, offered his parol evidence, if the defendants had barely objected to the evidence without assigning any cause, they would have reserved to themselves every cause which could make the evidence inadmissible. But having assigned the cause on which they relied, *viz.* that no parol evidence was admissible to prove a record, the plaintiff was induced to meet them on that ground, without proving that the execution had come to the Sheriff's hands, which I presume he could have done, and must have afterwards done to the jury, otherwise he could not have obtained a verdict. In the case of *Baring* v. *Shippen*, 2 *Binn.* 154, the defendant offered in evidence a deposition, to which the plaintiff objected, because the witness was incompetent. The evidence was admitted and an exception taken by the plaintiff, who afterwards endeavoured to shew that the deposition was not legal evidence, because part of its contents was not evidence, and he had excepted to *all* and *every part of it.* But this Court decided, that inasmuch as he had founded his exception on the incompetency of the witness, he should not be heard on any other point. It really does appear to me, that the defendants gave the plaintiff reason to suppose that they relied solely on the general principle of parol evidence being inadmissible to prove a record, without taking into consideration the omission of proving that the writ had come to the Sheriff's hands, and therefore they should now be confined to that objection.

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On that state of the case, the evidence was clearly admissible, because the execution was not a thing which remained always of record, and was therefore always capable of being proved by inspection; but a detached paper, which in the usual course of business, would be delivered to the Sheriff and consequently out of the power of the plaintiff. My opinion therefore is, that there was no error in admitting the evidence.

DUNCAN J.—The fact in issue was, whether *Edwin Forbes* had been committed to the custody of the Sheriff, on the execution of *Hart & Co.*, and had escaped from such custody. To prove the execution, the plaintiff below having proved a notice to the Sheriff to produce the execution on the trial, offered a witness to prove its existence and contents. This was objected to on the ground, *that parol evidence could not be admitted of a record.*

This is the precise statement. It is an insulated exception; one point, to be judged of by itself, on which the opinion of the Court is required on facts distinctly stated. The state of the facts when the bill was taken, is that alone which is to be considered. It cannot be changed by any subsequent evidence, nor supplied by any opinion of the Court delivered to the jury; nor can a Court of revision make any presumption, nor infer any matter not stated. The plaintiffs offered the parol evidence with the proof of notice. To this evidence thus offered in connection, the defendants objected, on the ground that parol evidence of the execution could not be received. The defendants were not called on to admit any thing; they did not admit that the Sheriff ever had the execution; they put that very fact in issue by their plea. If the Court could draw any inference, there is not in the bill the minutest circumstance from which it could be judicially inferred. It is quite wide of the mark to contend, that because the plaintiffs could not possibly have recovered, without proof of the delivery of the execution to the Sheriff, after a verdict, it will be taken that such admission was made or evidence given. We cannot look out of the bill itself. We have no concern in this inquiry, with any other part of the proceedings. The bill stands or falls by its own merits.

It was not proved that the paper was lost. It was neither

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admitted nor proved, that it ever came to the hands of the Sheriff. What is it then, more or less, than this. That the Court received parol evidence of the execution, without proof of its loss. And why did they receive it? Because notice was given to the party to produce it, without proof that he ever had it, and which in his plea, he denied that he ever had. The fact that he ever had it, was gratuitously assumed by the Court. The plaintiffs in error have an undoubted right to stand on their objection, which embraced every thing respecting the admission of parol evidence. I am at a loss for possible expression, or imaginable form, in which it could be put more strongly.

The same objection lies to the admission of parol evidence of any species of writing, whether record or not. It may be proved if the writing is lost or traced to the hands of the adversary. Suppose it a bond, and the party objecting says, I object, because parol evidence cannot be given of a bond. Does that admit that he has the bond—does that dispense with the proof, or any part of the proof admissible, to let in the secondary evidence. If the allegation is, that the instrument is lost, would the loss be admitted because the party objects, that no parol evidence can be received of the instrument?

The objection was to the medium of proof. Parol evidence cannot be admitted of this thing. As a general rule of evidence, this cannot be questioned. If it was admissible, it must be because the case fell within some of the exceptions —its loss, or that it was in the hands of the opponent. He who alleges that his case is excepted out of the general rule, must make it out, that it falls within some of the exceptions of the cardinal rule of evidence, a departure from which, can only be justified by necessity. He must shew why he does not produce the best evidence, the instrument, and this can only be by proof of its loss, or that it is in the hands of his adversary, and notice given him to produce it. The plaintiffs in error, did not make one objection to the evidence below, and a different one here; that could not be endured. But they object here, as they did in the Common Pleas, that parol evidence ought not to be received of the execution. It has been compared to an objection to a deposition, but it is by this analogy. Objection is made to a deposition, on the

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ground of its incompetency or irrelevancy. Where it is reversed on writ of error, a different objection cannot be taken, that it did not appear that notice had been given. But if one objects to the whole body of the deposition, because it is incompetent, and the whole is received, if he can lay his finger on the smallest part of it, that was not legal evidence, the judgment would be reversed. It is true, if he confines his objection to a particular part, he cannot object to other parts, because if he had made it, the party might have waved it. But here the plaintiffs in error, resisted all parol evidence of the execution.

It is said, that in trover and conversion, for an instrument in writing, set out in the declaration, the defendant need not be notified to produce it on the trial. The reason of that is plain. The action is brought for the very instrument. The gist is the conversion of it. The complaint is, that it came to his hands, and he converted it. That is the very *gravamen*. But this action is not brought for the execution, or to recover its value. The *gravamen* is distinct; it may grow out of it, but is not for the recovery of the thing itself. In debt on a bond, plea *non est factum*, to be sure the declaration gives the party notice of the bond, but it will not be pretended, that the plaintiff could be permitted to give evidence of its contents, on the allegation that it was in the defendants hands, without giving him notice to produce it. In trover for a promissory note alleged to be converted by defendant, you need not give him notice to produce it on the trial; but in assumpsit for the money due on a note, if you go into parol proof of its existence, and allege it to have come to the defendant's hands, you must give him notice to produce it. The difference is, where the action is for the very writing, notice to produce it is not required, and where it is not for the recovery of the writing, or damages for its conversion, but to recover for some thing arising on or growing out of the writing, there notice must be given, if it is alleged that it came to his hands.

I have considered this case with a mind strongly disposed to concur with the Court in getting over this objection, but my judgment cannot be governed by my inclinations, and I feel no regret that a majority of the Court think differently from me, because it is likely that in this particular instance, the ends of substantial justice may be subserved.

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But it is the precedent I deprecate. Relaxation will follow on relaxation, until all the benefits of bills of exceptions will be destroyed, and instead of the Court having a certain guide in the bill itself, the facts distinctly stated, they will be called on to infer, and presume, and conjecture, that something not to be found in the bill, was admitted, in order to support the judgment. It would be better at once to open the bill, and let all omission be supplied, by receiving evidence of what took place on the trial.

I agree that the plaintiffs in error have failed in all the other exceptions made by them, but this I think they have fully supported.

The sad lesson experience has taught us, of the inconveniences resulting from the Act requiring Courts to file their opinions in writing, I desire to profit by. Take from the bill of exceptions its characteristic precision, and you strip it of all its excellence,—of its acknowledged superiority, both in point of convenience in practice, and certainly in the administration of justice over opinions filed.

Judgment affirmed.

HARKER *against* ELLIOT.

September.

IN ERROR.

If an award of referees in the Court below is good on its face, this Court will not on a writ of error enquire into exceptions made to the proceeding of the referees as to matters of fact or matters of law before them, and if the evidence, and documents on these points are blended by the Court below with the record returned, this Court will pay no regard to them.

THIS was a writ of error to the Court of Common Pleas of *Allegheny* county, in an action of debt brought there by, *West Elliot*, the plaintiff below, against *Ezekiel Harker*.

The case was argued in this Court by *Forward*, for the plaintiff in error, and *Hopkins*, contra.

PER CURIAM.—This was an action of debt brought by *West Elliot*, the plaintiff below, against *Ezekiel Harker*, which was submitted to referees under the Act of 1705. A

report was made in favour of the plaintiff, to which exceptions were taken by the defendant, but overruled by the Court below, who approved of the award and entered judgment on it. The award is good on its face, but the defendant assigns errors, not in the award, but in the proceedings of the referees, and their opinion on a variety of matters, principally of fact, while they were engaged in those deliberations which led to the result contained in the award. The Court of Common Pleas (the PRESIDENT declining to sit in the cause, because he had been counsel for one of the parties,) examined a variety of papers, and witnesses, and went fully into the merits of the case, and ordered their prothonotary to file those papers together with notes of the evidence, in order that this Court, might know the grounds on which they founded their opinion. This is a novel proceeding, never before heard of, though the Act of 1705, has now been upwards of a century in operation; and its tendency is to deprive the plaintiff of the fruits of the award, until it has been controverted on its merits in the Court of the last resort. These papers, and this evidence, ought not to have been blended with the record, and although they have been sent up to us, we can pay no regard to them. The exceptions to the award, were an appeal to the discretion of the Court of Common Pleas, just like a motion for a new trial; and that Court was not bound by the strict rules of law, in deciding on them. It was said by the Court, in the case of *Hollingsworth* v. *Leiper*, 1 *Dall.* 161, "that great latitude has always been allowed, as to the evidence which the referees may hear; the parties unassisted by counsel, are allowed to tell their own stories, their witnesses are heard without oath, unless required, and books and papers are examined, which are not strictly legal evidence." The Court, in their discretion, will set aside the award, if the referees have formed their decision upon grounds not agreeable to law, or even where they have been clearly mistaken in matters of fact. But these matters are not to be re-examined in a Court of error. The case before us is a sample of what might be expected, if this writ of error were sustained. Fourteen exceptions were taken to the award, depending almost altogether on fact. So that this Court is called upon to judge of matters of fact, and of matters of law, in which the Court below had a right to exercise their discre-

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tion. We have several times determined, that the granting or refusing of a new trial, cannot be assigned for error; and the Supreme Court of the *United States* has made the same decision. The case before us depends on the same principle; and the Court has no hesitation in declaring its opinion, that it ought not to enter into the consideration of the errors assigned. The judgment is therefore to be affirmed.

Judgment affirmed.

SEMPLE *against* BURD for the use of WILKINS and another.

IN ERROR.

September.

A mortgage not duly recorded is not a lien on the land against a subsequent judgment creditor.

A vendor who has given a conveyance and delivered possession has not a lien for the purchase money due on a bond, against a subsequent judgment creditor.

ERROR to the Court of Common Pleas of *Allegheny* county.

Debt on bond, brought by *James Burd*, for the use of *John Wilkins*, and *James Ross*, against *James Semple*. The facts, as they appeared from the opinion of the Court below, which was filed of record, were these. The bond, on which the action was brought, was given in part payment of a tract of land sold by *Burd* to *Semple*; a conveyance of the land was made and possession delivered. A mortgage was given to *Burd*, to secure the unsatisfied purchase money, which he neglected to put on record within six months. A judgment was afterwards obtained by *Dunning M'Nair* against *James Semple*, the land sold by the Sheriff to *Wilkins* and *Ross* for its full value, which did not discharge the judgment. *Burd* moved the Court to have the proceeds of the sale applied to his mortgage which was refused, and they were applied towards the discharge of the judgment. After this a new agreement was made between *Semple* and *M'Nair*, by which *Semple* was released from the balance still remaining due on *M'Nair's* judgment, which was upwards of 8000 dollars, and received back a part of his land, on very favourable terms. All this was done by the agency of *Wilkins* and *Ross*, who,

to protect themselves, purchased the whole interest of *James Burd*, and on the 10th *September*, 1810, paid the full amount of his debt and interest.

On the trial the following points were made by the defendant below, the plaintiff in error.

1st, That an unrecorded mortgage is a lien, as to judgment creditors, upon the mortgaged property, and that the Act of Assembly relative to recording mortgages applies only to purchasers.

2d, That this rule of law is not changed by the mode of proceeding, whether the suit be by ejectment, or *scire facias* on the mortgage, or by suit on the bond. The Court must equally, in each kind of suit, protect the defendant.

3d, That when a purchaser bids at Sheriff's sales, he bids for the property beyond all incumbrances, and must take it subject to them.

4th, That the plaintiffs are not entitled to consolidate on the 10th *September*, 1810, when they paid the money to *James Burd*, although the debt was then assigned and the money paid, but can only recover interest computed on the original sum in the condition of the bond.

5th, The bond being for the purchase money of the land sold to *Semple*, remained a lien on the land sold, although a deed had been executed therefor by the vendor, and delivered to the purchaser, together with possession at the date of the bonds.

The PRESIDENT charged the jury upon the 2d, 3d, 4th, 5th points, as follows reserving the first point for further consideration.

The position laid down in the 2d point is correct, that the mode of proceeding whether by ejectment, *scire facias* on the mortgage, or by debt on the bond, would not prevent the Court from interposing to do complete justice to the defendant. As to the third point, it is of no consequence to the purchaser, whether there are or are not elder judgments, constituting liens on the property; it is the duty of the Sheriff to apply the monies according to the rights of the parties having liens; with this the purchaser hath no concern.

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Upon the fourth point, it is conceived that the law is clearly with the defendant. It is not for us to say what in conscience ought to be done by the defendant in respect to those who advanced their money for his protection, if the law be in his favour. The interest can only be calculated in the manner warranted by the bond. Upon the fifth point, we have no hesitation in declaring that the law is in favour of the plaintiff. According to the facts stated in that position there was no lien upon the land.

The jury found a verdict for the plaintiff.

To the opinion of the Court upon the fourth point, the plaintiff explicitly assented at the bar, and the decision on the second point was also acquiesed in.

The PRESIDENT afterwards delivered the following opinion on the first point.

At the trial of this cause it was contended on the part of the defendant, that an unrecorded mortgage is a lien as to judgment creditors, upon the property mortgaged, and that the Act of Assembly applies only to purchasers, and this point was reserved for the further consideration of the Court. It was agreed, that the opinion of the PRESIDENT of the Court should be filed, and that judgment might be rendered in case such opinion should be in favour of the plaintiff, so as to admit of the prosecution of a writ of error returnable at the next session of the Supreme Court.

Upon consideration I am clearly of opinion that an unrecorded mortgage is not a lien as to judgment creditors. And therefore that judgment be entered on the verdict.

The opinion of the Court was delivered by

DUNCAN J.—The facts as they appear from the opinion filed, are briefly these. The bond on which the action was brought, was given in part payment of a tract of land, sold by *Burd* to *Semple*, a conveyance of the land made, and possession delivered. A mortgage was given to *Burd*, to secure the unsatisfied purchase money, which he neglected to put on record within six months. A judgment was afterwards obtained by *Dunning M'Nair* against *James Semple*. The land was sold by the Sheriff to *Ross* and *Wilkins*, for its full value,

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which did not discharge the judgment. *Burd* moved the Court to have the proceeds of the sale applied to his mortgage, which was refused, and they were applied towards the discharge of the judgment. After this, a new agreement was made between *Semple* and *M'Nair*, by which *Semple* was released from the balance still remaining due on *M'Nair's* judgment, upwards of eight thousand dollars, and received back a part of the land on very favourable terms. All this was done by the agency of *Ross* and *Wilkins*, who to protect themselves, purchased the whole interest of *James Burd*, and on the 10th *September*, 1810, paid him the full amount of his debt, and interest. On the trial, the following points were made by the defendant below, the plaintiff in error, (his honour read them from the paper book,) on which the Court gave their opinion. It is to be understood, that though the first point was reserved, and no opinion given on it until after the verdict, yet by the agreement of the parties, it is evident, that it was to be considered as if given in charge to the jury, so that either party might bring a writ of error.

This point deserves and has received great consideration; for though there are many cases in which incidental opinions have been given, yet there has been no direct judgment. At a late session of this Court, the question was very fully discussed, and an opinion expressed coinciding with that given in this case, "that an unrecorded mortgage was not a lien opposed to a subsequent judgment," yet it was not the direct matter in judgment. *Kauffelt* v. *Bower*, *ante*, 64.

A judgment in this State, in its operation, differs in many, and very important respects, from judgments in *England*. Lands here are considered chattels and assets for payment of debts, and may be sold on execution. A judgment here, does not bind after purchased lands; there, it does. Here, by a sale on a judgment, the right of dower is extinguished; there, the right of dower is not impaired either by judgment or mortgage. Here, it is a lien on every kind of equitable interest in land the debtor held at the time of judgment; there, it only binds the legal estate. In treating of the effects of a judgment, we cannot apply to them the principles of the common law. The state and condition of the country, the difference of circumstances between a young country and an old settled country, will always introduce new doctrines,

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adapted to the state of society and property; and although the common law generally is binding, yet many of its doctrines, particularly the feudal doctrines of investiture and alienation, have been departed from in our modes of acquiring and transferring lands.

Any difference of opinion that may have existed, has arisen from not discriminating the consequences of not recording a mortgage, and an absolute conveyance. In the case of a mortgage, no estate passes, unless the deed is recorded within six months; and however the instrument may operate on the mortgagor, yet, as to third persons, as the law condemns it, and declares it a nullity, it cannot be susceptible of any effect. But very different is it where the conveyance is absolute; there the law does not declare it null, the estate passes; it is declared void only against subsequent purchasers, or morgagees, for valuable consideration. A judgment for the term of five years, equally binds the lands of a debtor, as a mortgage does; comes in on a sale by the Sheriff, equally with a recorded mortgage; they are paid according to their priority, without regard to their quality.

In *England*, a man is supposed to lend money not on the view of the cognisor's real estate; the judgment is there not a specific lien on the land; the creditor is supposed not to go on the security of the land, but trusts to the general credit of the debtor, and his estate. 1 *P. Wms.* 278, 2d 492. 2 *Ves.* 622. But in *Pennsylvania*, a creditor relies on the real estate always as a fund, and where he takes a judgment bond, with a stay of execution, as the sole fund, in which he confides. *Colhoun* v. *Snider*, 6 *Binn.* 145. And even in *England*, where one advances money on the credit of a judgment, he stands in a different situation from a general judgment creditor; for in equity he is considered *quasi* a purchaser, or mortgagee. *Prec. in Chan.* 478. The judgment gives the creditor a general lien; the mortgage, a specific one. This is the only difference; for a mortgage is but a security for the debt specific and limited; the judgment unlimited; the securities are equal there is no priority.

There is a recognition of the principle, that an unrecorded mortgage is no lien against a subsequent judgment, a legislative construction that it does not exist, that it shall not operate, in the Act of 23d *September*, 1783. That Act pro-

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vides, that all mortgages executed between the 1st *June*, 1776, and 18th *June*, 1778, which have been recorded, or which shall be recorded, within six months after the passage of the Act, shall be as good and effectual in law, as if they had been recorded within the limited time, but with this exception; "that they shall not operate against any subsequent judgment or lien whatever." Now if unrecorded mortgages prevailed against subsequent judgments, the provision was nugatory, and the exception retrospective, impairing the lien, which the unrecorded mortgage held against a subsequent judgment. And by the late Act of 28th *March*, 1820, the sense of the Legislature is further evidenced. The Act declares, that no mortgage or defeasible deed, in nature of a mortgage, shall be a lien until such mortgage or defeasible deed is recorded, or left at the office for record, except only in the case of a mortgage for the purchase money of the land mortgaged, whose lien is not to be affected by the Act, if the same is recorded within sixty days after execution. If recorded within the time limited it has relation to the execution; if not, then with all other mortgages, it has only relation to the day of entry. The prevailing object of the Legislature, has uniformly been, to support the security of a judgment creditor, by confirming his lien, except when it interferes with the circulation of property by embarrassing a fair purchaser. So far as the question has been mooted, judicial opinion has always been in conformity to the same principle. The case of *Levinz* v. *Will*, 1 *Dall.* 430, and *Parker and another* v. *Wood*, 437, are strong evidences of judicial understanding. For in the first, though the decision was, that an unrecorded mortgage was good against the mortgagor, the Court thought that if it was not good as a mortgage, yet it was binding on the mortgagor, as another species of conveyance, a covenant to stand seised to uses. But the true reason, without resorting to any other construction of the instrument was, that it injured no one; affected not the rights of any other third person, and was binding on the man who executed it, as a mortgage. And in the latter, it was admitted by all the counsel and the Court, that a subsequent judgment in a common case, would prevail against an unrecorded mortgage, and the ground taken, (and it was impregnable ground.) to uphold the mortgage was, that the mortgagee having caused it to be ente-

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red on the record book, though the office of recorder was vacated by the declaration of independence, was doing all the party could do, during the *interregnum* to give notice; it never was imagined by the counsel, it never entered in the mind of the Court, that the lien was preserved, for then no debate would have arisen in them; the Court would at once have decided on that ground; but all admitted the lien was gone, if there had existed an office in which the mortgage could have been legally recorded. The case of *Tuthill's Lessee* v. *Dubois*, 4 *Johns.* 216, in *New York*, was decided on the local statute concerning mortgages, which provides that no mortgage shall defeat or prejudice the title or interest of any *bona fide* purchaser, unless duly registered. Before the statute, there was no necessity of registering mortgages; since the statute, they must be registered or lose their priority as to junior mortgagees, or *bona fide* purchasers prior to the registry. The principle on which this decision was made was, that the statute requiring the registry, confined its operation on unregistered mortgages, to the two cases of subsequent mortgagees, and *bona fide* purchasers, leaving the lien to rest as to judgments, as if the statute had never been made. The unregistered mortgage and conveyance are provided for in the same manner. The consequences of not registering are limited to the two cases; but herein the different consequences of not recording a mortgage, and not recording a conveyance, are distinctly marked; they do not rest on the same footing. In the one, no estate passes; in the other, the estate does pass, against all but subsequent mortgagees and purchasers. The declared sense of the Legislature, the opinion of professional men, the common understanding of the Courts, and these are safe rules by which to fix the construction of an ancient law, and experience the best and safest test of any rule of construction, all unite to prove, that a mortgage not recorded within the time limited by law, will not prevail against a subsequent judgment. There was no error in the decision of the Court on that point, for an unrecorded mortgage is not a lien as to judgment creditors. It is to be observed, that when I speak of the lien by mortgage unrecorded becoming extinct, it is meant a mortgage not recorded within six months, for if it is so recorded, the lien relates to the execution. A mortgage not recorded within the six months has no lien by relation, but it is a lien from the entry

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on the record, and obtains against a judgment entered subsequent thereto.

If then, an unrecorded mortgage taken for the purchase money of land sold, does not hold a lien on the land, a *fortiori* a nude bond could not; for that would be giving to a mere personal security, which is a lien by implication only, a greater force and a higher privilege, than to an unrecorded mortgage, which was given as a real security; and giving to a simple unprivileged obligation, the same effect as a recorded mortgage; and declaring that while a mortgage should lose its hold, if not recorded within a limited time, the bond which it was given to secure, should retain it to an unlimited time, than which nothing could be more irrational. But this was decided in the case of *Kauffelt* v. *Bower*, already referred to, (*ante*, 64,) where this Court determined the broad principle that a vendor who had given a conveyance and a receipt for the purchase money, and delivered possession, but who had taken bonds for an unsatisfied portion of it, retained no lien upon the land, and that a purchaser on a judgment against the vendee, held the land discharged of the unsatisfied purchase money, and the Sheriff could not pay over the proceeds of the sale to the vendor, but must pay them to the judgment creditors. On this point, the opinion of the Court was right.

But in truth, I cannot see how the decision of the question in any way could absolve the defendant from the obligation to pay this bond. The controversy was not between the mortgagee, or the vendor and the judgment creditor; by accepting the release from *M'Nair*, he ratified the sale, he confirmed the application of the money arising from it, and he is not now to be received to contradict it, even had he a superior interest, and an original right to require its application to the debt of *Burd*. He has himself applied it to the payment of one debt, he shall not now recall it, and insist on its application to another; he shall not have it doubled to pay his debts.

There stood no legal impediment in the way of *James Burd;* had he continued the party in interest, his right to recover could not be questioned. How then can it be impeached in the hands of *Ross* and *Wilkins*; what taint has it received in its transit to them? If such taint existed, it has not been

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pointed out. It is beyond my vision to discover, or understanding to comprehend, what there is against conscience in the demand of payment; if the obligation originally was valid. When we consider the manner and the purpose for which they obtained it, it lost nothing of its binding effect by the assignment. The sale to them was at its full value, the defendant's debt was paid by it, he avails himself of the appropriation; obtains by the agency of *Ross* and *Wilkins*, a release of the large balance still remaining, and through them on favourable terms, obtained back a portion of his estate which had been sold. What injury has he to complain of, what *scintilla* of equity to plead. If *M'Nair's* debt had not been paid by the sale, he would have remained *M'Nair's* debtor. What difference can it make to him, whether he is called on to pay *M'Nair's* debt or *Burd's* debt; if *Burd's* real security was lost by his neglect, the personal security still remained; if the mortgage lost its lien on the land, the bond did not lose its binding effect: the personal security by the bond was not destroyed by any act of the parties, or extinguished by operation of law. Why should it be, that he should not pay for this land? The title was good, he enjoyed the full benefit of his purchase; the mortgage, though not recorded, bound him, the bond bound him, the land went to pay his debts. It lies not in the mouth of the defendant, to say to *Burd*, "the land which I bought from you, I sold (or which is the same thing, the Sheriff sold it,) for its full value. You lost your security by your own neglect of the land, and could not obtain payment from that fund, and because you have done so, and because your land has gone to pay my other debts, it is iniquitous for you to demand the price of your land." As little does it lie in his mouth to say to the assignees of *Burd*, "you have aided me in my distress; by your agency I was relieved from the large balance still due to *M'Nair*; by your means, I got back on good terms a good part of my estate, which had been sold to pay my debts; and because you have done this, though this was a great debt of *Burd's*, for which you have paid the full amount, yet I will not pay you." This would be a most unaccountable equity. To sum up all in a few words, *Semple* has not paid the debt, it was not extinguished by operation of law or act of the parties. *Burd* could have

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coerced payment. *Ross* and *Wilkins* have paid to the uttermost farthing; they stand in the shoes of *Burd*. The defendant is not prejudiced by any act of theirs, he was bound to pay it to *Burd*, he is bound to pay it to those who have acquired his right.

Judgment affirmed.

GIBSON J. gave no opinion, having been sick and absent at the argument.

FLEMING *against* ALTER.

September.

IN ERROR.

If a father holds the legal title of land in trust for his son, and they agree to sell the land, and the father receives the purchase money and promises to pay the debts of his son, a creditor of the same, who had previously obtained judgment against the son, and levied on the land, may sustain *assumpsit* for money had and received, against the father.

ERROR to the Court of Common Pleas of *Westmoreland* county.

John Alter, plaintiff below, brought this action of *assumpsit*, for money had and received, against *Robert Fleming*, and the case come up on a bill of exceptions taken by the defendant, to the evidence offered by the plaintiff in the Court below.

The opinion of the Court was delivered by

DUNCAN J.—This was an action for money had and received to the use of defendant. The facts were briefly these. *Robert Fleming* being the owner of a tract of land, transferred the land to his son *William Fleming*, but did not execute a conveyance. About the year 1800, *William* took possession, occupied and improved it, and was reputed the owner of it. On the 20th *February*, 1801, he gave his single bill to *John Alter*, for eighty-six dollars, on which judgment was entered, execution issued, and levied on this land. *William Fleming*, in 1806, agreed to sell the land to *Samuel Lippincott*, with the knowledge of his father *Robert*, who agreed to execute a conveyance to *Lippincott*, declaring the land to

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be *William's*, and on the 17th *April*, 1806, did execute a conveyance to *Lippincott*, in consideration of 1183*l.* 10*s.* The bonds for the purchase money were given to *Robert Fleming*. All had been paid, but the last bond for payment of 100*l.*, and *Robert Fleming* declared he would pay the debts of *William*. There can be no question but that *Robert Fleming*, in some form of action, was liable to pay this debt, and although the promise was not made to *Alter*, yet being for his benefit, he might accede to it, and inforce payment. This action for money had and received, is most liberal; it is in effect a bill in equity. Now if a Court of Equity would decree the payment of this money, no action is more proper than this. This was money in the hands of defendant, received by him in trust for the creditors of his son *William*, in fact money received for their use. The father held the legal title in trust for his son, he agrees to convey to *Lippincott*, does convey, receives the money and promises to pay the debts of his son; in good conscience he would be bound to pay independent of his express promise. In this form of action, plaintiff can recover no more than has come into the hands of defendant. It is subject to every equitable defence, *ex equo and bono*. The money received for the land was money received by defendant below, in trust to pay the plaintiff, and it is evident that this action was well adapted to the nature of the plaintiff's claim; none could be more so. The Court will not suffer a party to be taken by surprise by the generality of the declaration. Here there could be no surprise; the defendant if not informed of the nature of the claim, could have called on the plaintiff for a specification.

Judgment affirmed.

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MARLIN *against* WILLINK and others.

IN ERROR. *September.*

ERROR to the Court of Common Pleas of *Crawford* county, in an ejectment brought by *Wilhelm Willink* and others against *Ralph Marlin.*

After articles for the sale of land, on which the vendor receives part of the purchase money in hand and the residue is to be paid in several instalments, if the times of payment have long expired without payment by the vendee, before or after the suit brought, the vendor may recover in ejectment.

On the trial in the Court below, the plaintiffs gave in evidence articles of agreement made between them, and the defendant, on the 26th *September*, 1808, for the sale of the land to the defendant. The purchase money was 656 dollars, 30 cents, of which 308 dollars, 62 cents were paid in hand by the defendant at the time, for which the plaintiffs gave their receipt: the residue was by the agreement to be paid in five equal annual instalments commencing the 1st *April*, 1809, with interest, but no part thereof had been paid, or was offered to be paid before or after this suit was brought. The defendant requested the Court to charge the jury that the plaintiffs were not entitled to recover in ejectment, but that an action of covenant was their proper remedy. The Court charged, that the plaintiffs were entitled to recover. The defendant excepted to this charge.

DUNCAN J. Delivered the opinion of the Court.

This is the plainest of all cases. It is a case of ejectment, between vendor and vendee, the vendee covenanting to pay the purchase money at certain designated periods, all of which had long expired before the commencement of the action. The hand money had been paid on the execution of the articles. The residue was to be paid by five annual instalments, none of which had been paid, or were offered to be paid, or the money brought into Court on the trial of the cause. The legal title was in the vendors. The plaintiffs below, defendants in error, in a Court of law, unquestionably could recover, and the remedy of the plaintiff in error would be by bill in equity. But equity would not grant relief, nor enjoin the vendors from proceeding on their judgment, but on payment of all

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the purchase money due. There being no Court of Chancery here, our Courts grant the same relief that Chancery would. The ejectment is in the nature of bill for specific execution, but as the Courts of law cannot compel the execution of a conveyance, the vendee may retain the possession, provided he has complied with his contract, or offer to comply with it by a tender of the purchase money due on the trial of the cause. But if he declines to do this, the vendor can recover the possession. He is not confined to one remedy, he may bring ejectment, or covenant or debt for the sum due on the articles. By the stipulation in the articles, the vendors do not covenant to convey on any particular day, but on the payment of the money. The payment of the money is a condition precedent, until it is paid or tendered, the vendee cannot call for conveyance of the title. He could support no bill for specific execution, chancery would grant no injunction. The equitable relief to which the defendant is entitled, is not however extinguished by non payment of the instalments as they become due, the time is modal and not the essence of the contract. Chancery would relieve against even the lapse of time, when the delay was not unreasonable, and they would where a considerable part of the purchase money had been paid, possession taken, improvements made, be less rigid in the consideration of the time, than where no money had been paid, improvements made, possession taken. The course of proceeding by ejectment, by vendor who has not parted with the legal title is not unusual. In some instances where there is no Court of Chancery, it might be his only remedy. The vendee might reside out of the State, out of the *United States*, leaving a tenant in possession; no judgment unless by the circuitous and tedious course of foreign attachment could be obtained, and in case of his death, even that remedy would not exist, as attachment would not lie against executors or administrators. What is the legal right of the defendant in error? the land, because they hold the legal title. What is the equitable right of plaintiff in error? A conveyance of the legal title according to his contract. That prescribes payment of the whole purchase money as a condition, and before he has done this, as he has had no legal title, so the time of payment having arrived, and having made default, he has no claim

either in law or equity to hold the possession of that for which he refuses payment.

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The remedies of vendor and vendee, are mutual; for ejectment will lie against vendor by vendee on articles of agreement, after tender of the purchase money. 4 *Binn.* 177, 2 *Yeates.* 344. So vendor may maintain ejectment against vendee if purchase money be not paid. 1 *Yeates.* 12. How far plaintiff in error, may still have redress on tender of the purchase money, the Court are not called on to decide. They only decide that the plaintiffs below were entitled to the possession, defendant not having paid or offered to pay the purchase money.

The Court were requested to instruct the jury, that on the equity, disclosed by the plaintiff in error, *viz.* the articles for the conveyance of the land, and receipt for payment of part of the purchase money, the defendants in error were not entitled to recover in ejectment, but that covenant was the only remedy. This the Court very properly refused, but instructed the jury, that ejectment would lie in such case. There was no error in this. The judgment is therefore affirmed.

Judgment affirmed.

ALEXANDER *against* STOKELY.

IN ERROR.

September.

ERROR to the Court of Common Pleas of *Westmoreland* county.

A judgment in a *homine replegiando* by the mother, in which she is decided to be free, is conclusive evidence against the defendant in such suit, who subsequently brings a *homine replegiando* against a third person, in which she claims the daughter of such former plaintiff as a servant till twenty-eight, such daughter being born after the judgment, and her freedom or obligation of service depending on the freedom or slavery of her mother.

This was a *homine replegiando*, brought by *Susannah Stokely* against *John B. Alexander*, to try the right of the plaintiff below, defendant in error, to the services of a negro girl

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named *Nance*. *Nance* was the daughter of *Milley*, a coloured woman. If the mother were the duly registered slave of Mrs. *Stokely*, then *Nance* being registered, was her servant till twenty-eight, by the laws of the State; but if she were not, then she was free. The defendant on the trial, offered in evidence, the record of a judgment of the Court of Common Pleas of *Westmoreland* county, in an action of *homine replegiando*, brought against *Susannah Stokely*, by *Milley*, the mother of *Nance*, in which Mrs. *Stokely* pleaded that she held and kept *Milley* as a slave duly registered. On this plea issue was joined. There was a special case stated for the opinion of the Court, in which the ground of the plaintiff's right to hold *Milley* as a slave was set out, and her claim was founded on the registry stated in the record, and on that alone, and on this case the Court gave judgment for the plaintiff *Milley*, which judgment remained unreversed and in full force. This record was rejected by the Court below, and a bill of exceptions taken. The Court below gave judgment for the plaintiff, on a demurrer to the evidence taken by the defendant below.

Forward, for the plaintiff in error, cited 13 *Johns.* 141. *Phill. Ev.* 234. 2 *Wash. Rep.* 64. 2 *Hen. & Munf.* 193. *Co. Litt.* 352. 7 *Cranch.* 271. *Act of Assembly*, 13th *April*, 1782.

Foster, contra, cited 3 *Yeates.* 259. 3 *Serg & Rawle*, 396. 3 *Binn.* 161. 1 *Sm. Laws*, 497.

The opinion of the Court was delivered by

DUNCAN J.—*Nance* was born after her mother became a free woman, on account of the defect in the registry, as was decided in the action brought by her mother against *Susannah Stokely*; and the question is, whether *Susannah Stokely* is estopped by this judgment, from now averring contrary to the title thus found that *Milley* was her slave. I do not propose the question whether it is evidence to go to the jury, on the issue on trial, but on the ground of its conclusiveness. *A recovery in any suit upon issue joined, on matter of title, is conclusive on the subject matter of title.* An allegation on record, upon which issue has been once taken

and found, is between the parties taking it, and their privies, conclusive according to the finding thereof, so as to estop the parties respectively, from again litigating that fact, once so tried and found. Now nothing can be clearer than this, that the children are privies in blood to their mother; and so far as regards the state of the mother, whether a slave or free at the time of their birth, are privies in estate. It is unnecessary to decide, whether children would be bound by judgment against their mother on a question of her freedom; yet even to support that doctrine, there is very high authority. In the Court of Appeals in *Virginia*, it was decided, that in an action for freedom, a verdict finding the mother to be free or a slave, is conclusive evidence between a child of the plaintiff, and one claiming under the defendant in that suit. *Shelton* v. *Barbour*, 2 *Wash.* 64, and *Pegram* v. *Isabell*, 2 *Hen.* & *Munf.* 193, where in the case of a child, the record against the mother was produced, and the Court decided, it was upon the child to shew, that he or the mother was *manumitted* since the verdict.

But in a case of a child claiming to be free, because the mother in a suit wherein the same person was a party claiming the services of both, was adjudged *free*, on an allegation appearing on the record precisely found, that the mother was free when the child was born, I can entertain no doubt; but, on principles of reason and authority, the judgment is *conclusive* as to the freedom of the child. The first step the defendant must take, would be to prove that the mother was a slave; *partus sequitur ventrem.* The child is born free according to the condition of the mother, and if in an action wherein the person claiming the service of the child, is one party, and the mother is the other party, she has been declared free by the judgment of a Court of competent jurisdiction, that matter cannot be again called in question. The child with the record in his hand, cannot be held in slavery or servitude. There is an end of the question as to the mother. The condition of the mother is changed, and it would shake our understandings, if the law were so, that a child whose mother by law had been free before her birth, should notwithstanding be born a servant or slave. In all personal actions concerning goods, chattels, and debts, a recovery in one action, is a bar in another, and there is an

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end of the controversy. *Coke's preface to his eighth report.* The judgment which is the fruit of the action, concludes the existence of the right. If this child had been born after the judgment in favour of the mother, it could not be pretended, that the plaintiff below, could retain her as a servant; yet this judgment has relation to the condition of the mother when the child was born, which has been conclusively settled to be that of a free woman.

The judgment is final for its own proper use and object, and is conclusive on its subject by way of bar to future litigation, for the thing thereby decided. The judgment was on the very right to hold the mother in slavery. That judgment was that she ceased to be a slave long before the birth of this child. That was the immediate right in demand; the whole right of the plaintiff in this action hung on that inquiry. She claimed by and through the mother. Freedom or slavery of the mother was the substantial matter in issue in both suits. A case in the *Year Book*, 13 *Ed.* 4. 2. 3. 4. comes up to this. It was trespass for taking a villein. The ancestor of the villein had answered in a former suit in which it had been alleged, that he was a villein regardant, that he was free, and not a villein in manner and form as alleged, and it was so found. The son of the supposed villein relied on this finding as an estoppel, and it was held so. In *Ingleton* v. *Burges*, *Comb.* 166, Lord HOLT cites this case, and says, it was perhaps grounded on the reason of the favour of liberty, but it would appear, that it was expressly decided upon the identity of the matter in issue.

The Court erred in not admitting this evidence; it was not only relevant, but conclusive. Strictly speaking, as the former judgment was not pleaded, it might not be considered a legal estoppel, yet it was conclusive in evidence on the rights of these parties. It was not possible for the plaintiff in this action to affect its conclusiveness by shewing that *Milley* had become free subsequent to the birth of the child, because the matter put in issue, and the title set up by her, was her registry as a slave in 1780. That issue being found against Mrs. *Stokely*, it passed *in rem judicatam*, that she became free in 1780; then there could be no foundation for the claim to *Nance*, *Milley's* child, born of a free mother as a servant until twenty-eight.

This has rendered it unnecessary for the Court to give any opinion on the testimony demurred to; the Court could render no judgment on that.

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Judgment reversed.

SKEEN *against* PEARCE.

September.

IN ERROR.

A title cannot be acquired by entering and making a settlement upon and procuring a survey of lands, for which another person had obtained a warrant and survey, under the Act of 3d April, 1792, but had not complied with the conditions of actual settlement and residence, required by that Act, unless such settler have obtained a vacating warrant or filed an application.

ERROR to the Court of Common Pleas of —— county, in an ejectment.

The opinion of the Court was delivered by

DUNCAN J.—The question has been stated with clearness and precision. It is a single point, "whether any person without obtaining a vacating warrant or filing an application, can acquire a title to lands, by entering into, making a settlement, and procuring a survey, for which another person had previously obtained a warrant, and had a survey made under the Act of 3d of *April*, 1792, but had not complied with the condition of actual settlement and residence, required by the Act." This depends on the condition of settlement annexed to the warrant, and the mode of re-granting by the Legislature; and this mode appears to be clearer of ambiguity, than almost any part of this obscure Act, which has divided the opinion of the most eminent Judges. The Act provides, that in default of such actual settlement and residence, "it shall and may be lawful for the Commonwealth to issue warrants to other actual settlers for the same lands or any part thereof, reciting the original warrant, and that actual settlement and residence has not been made in pursuance thereof, and so often as defaults have been made for the time being and in manner aforesaid, which new grants shall be under and subject to all and every the regulations contained in this Act."

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For this condition broken, the State alone could enter. The lands sold and for which the price had been paid, did not revert back to the State to be disposed of as vacant and unappropriated land, for if so there had been no occasion for further provision, the original terms would attach as the forfeitures arose.

The vacating warrant is substituted for the right of entry by the State; the grant of a new warrant, founded on the vacation of the first, confers the State's right of entry on the second warrantee. But lands which have been granted by the State, and which escheat and fall back to the State for want of heirs, alienage or forfeiture for treason or any other cause, are not open for settlement, or grant, as the common unappropriated land of the State, *Lessee of Blaine* v. *Crawford*, 1 *Yeates*, 290. For as was justly observed by the Court, the same law which vested the property in the State, qualified the sale of it, by the instrumentality of certain persons, authorised for the specific purpose. Lands vested by forfeiture for treason, could not therefore be disposed of on the common terms of vacant lands. Where the law prescribes the mode and manner in which rights to lands, accruing to the State, by reason of any default in the grantee, shall issue, that mode, and no other must be pursued. Here it is to be by a special warrant of specific form; in no other by the express words of the Act can a new grant be obtained; for the mode is not merely formal and directory, but substantial, imperative and restrictive. It will be found, that the term, actual settler, employed frequently in the various sections of the Act, is not applied exclusively to him who has made and continued his settlement, but is used to denote one who is desirous to settle and improve according to its provisions, as distinguished from a warrantee. There are solid reasons why the State should act on the forfeiture for default, before an entry should be authorised by an individual. The new warrant is in the nature of an inquest of office or a formal re-entry by the State; and in the case of every estate on condition, where the condition is broken, it is a well known principle of the common law, that a re-entry is necessary to defeat the estate first granted. An estate of freehold cannot cease without an actual entry. A tenant at sufferance coming in by lawful demise, and after the determination of his estate,

holds over wrongfully, yet trespass will not lie against him, before an entry made. It would introduce many mischiefs, if it were allowed to every private person to assume the power of determining when the estate of settlers or warrantees should cease, and warrant the entry *mero motu* of him who chose to make it. An easy method is prescribed, not for the first time in *Pennsylvania*, but borrowed from an ancient practice, under the proprietary government, of issuing a vacating warrant, which, although it recited a forfeiture for non-performance of some condition, was not founded in fact on forfeiture, but generally, if not always, arose from the actual abandonment of the first warrantee; or his title being vested by some irregular transfer; or bare delivery of the warrant, very common in early days; or sale by administrators, without an order of the Orphans' Court, by executors without power in the will; or a mere verbal agreement, or some other special equity in the person who applied for the second warrant. *Lowry* v. *Gibson*, 2 *Yeates*, 84.

This construction was established by many decisions at *Nisi Prius*, and approved of by the Judges of this Court sitting in bank, and, although the direct question was not in judgment in bank, has been long acquiesced in, and fixed the construction, making it a rule of property, and I think was the true construction in the first instance. But if this construction appeared to me to be doubtful, as there is nothing in it repugnant to natural justice, as it does injury to no man, and tends to preserve the peace of the community, which would frequently be in danger, if every man *ad libitum* was to assume the power of re-entry, without a license from the State, I would abide by it; for nothing ought more to fix the construction of a statute, than a contemporaneous, frequent and continued exposition, and nothing could be more dangerous in this part of the State, than to call in question a series of decisions, happily acquiesced in, which has done so much to restore peace to the inhabitants, and given security and stability to titles, on mere speculative opinions. The Legislature have acted upon this construction, for by the Act of the 21st of *April*, 1804, it is provided that applications of actual settlers, under the Act of the 3d of *April*, 1792, describing particularly the land applied for, and filed

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with the secretary of the land office, shall, for two years, entitle the applicant to the privileges and benefits, that an original or vacating warrant would; thus affording a strong legislative construction, that a vacating warrant or some substitute therefor was necessary. *Jones* v. *Anderson* 4 *Yeates*, 569. This vacating warrant is not mere matter of form, or thing merely technical, but a matter of serious importance, of grave substance, requiring satisfactory evidence to be exhibited in the land office of the default, before the first warrant is vacated, and a new one issued.

The construction given by the Court of Common Pleas, agrees with the text of the Act, the contemporaneous exposition of the Judges of the Court, the interpretation of the Legislature, the analogous principles of the Common law, the reason of the thing and the public peace. I am therefore of opinion that judgment be affirmed.

Judgment affirmed.

HELVETE *against* RAPP.

September.

IN ERROR.

An entry by the prothonotary on his docket of a suit, and that a judgment bond was filed of record therein stating the particulars of it and the date of entry is a good entry of a judgment under the Act of 24th February, 1806.

ERROR to the Court of Common Pleas of *Beaver* county.

On a *scire facias post annum et diem*, in the Court below, at the suit of *Frederick Rapp* against *Francis Helvete*, to revive a judgment, *William Wilkins*, a judgment creditor of *Francis Helvete*, appeared, and pleaded *nultiel record:* the plaintiff replied, *habetur tale recordum;* and rule to bring in the record. The record when produced was as follows.

Frederick Rapp. v. *Francis Helvete.*

Penalty	-	$ 5450 00
Real debt	-	2725 38

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Plaintiff files of record a judgment bond, under the hand and seal of defendant for the sum of 5450 dollars, conditioned for the payment 2725 dollars, 38 cents, on or before *November* 5th next, dated 5th day of this inst., and entered the 17th *May*, 1815.

Judgment thereupon was rendered on the *scire facias*, in favour of the plaintiff.

Baldwin and *Wilkins*, for the plaintiff in error, contended, that under the Act of the 24th *February*, 1806, this was not a good entry of a judgment on a bond and warrant. The mere filing of a bond is not an execution of the warrant of attorney. The word judgment is technical, and cannot be supplied by simply filing the bond. Judgment can only be rendered by the Court: filing the bond constitutes no lien. The Prothonotary, under the Act, must do what the attorney otherwise would do, namely, enter a judgment. The act effects no change but to take away the attorney's fee.

Campbell contra, relied on the object of the Legislature, which was to dispense with form, and obtain the substance of the entry, namely notice to creditors and purchasers, and on the constant practice. He cited 2 *Binn.* 43, *Rob. on Frauds*, 431. 2. 10 *Johns.* 467. *Str.* 585. 2 *Ld. Ray*, 1350. 4 *Bac. Ab.* 648. 3 *Johns*, 586.

The opinion of the Court was delivered by

DUNCAN J.—The evident and sole intention of the Legislature in conferring the power of entering a judgment on the judgment bond without the intervention of an attorney was, to exempt the obligor from the payment of costs to an attorney. This Act was passed on 24th *February*, 1806. It provided that the Prothonotary of any Court of record, on the application of the original holder, or his assignee of a note, bond, or other instrument on which judgment is confessed, or containing a warrant for any attorney, to confess a judgment, shall enter judgment against the person or persons who executed the same, for the amount which from the face of the instrument appears to be due, without the agency of any attorney, or declaration filed, particularly entering on his docket, the

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date and time of the writing, which shall have the same force and effect, as if a declaration had been filed, and judgment had been confessed by an attorney, or given in open Court in term time.

The Court decided this issue in favour of the plaintiff below, and gave judgment that he had such record as he had made profert of. No set form of words is prescribed, in which the Prothonotary shall enter judgment, as it is to be desired there had been, both for the sake of uniformity and precision. There being no literal form directed, and no precedent to guide the Prothonotaries in the exercise of this new duty, each has adopted his own mode; they are as various as their faces, and many of them scarcely present a feature to inform a purchaser or designate a judgment; but here is a substantial entry of a judgment bond, containing all that is necessary to give information. It is entered on the docket in the form of an action, as a judgment bond, the names of the parties, the amount due, the date and time of the writing. It states the entry of a judgment bond, and seal of the defendant; the judgment bond is filed of record, entered the 17th *May*, 1815. What is entered? a judgment on the judgment bond filed. No man could be deceived by this mode of entry, for however inartificial it may be, however defective in the technical words of a judgment, none who called for information could be led into error; the docket entry gave full information. It might have been more formal, but still it is the entry of a judgment entered by the Prothonotary, who was authorised to make the entry. The judgment of the Court of Common Pleas is affirmed.

Judgment affirmed.

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WEIGLEY'S administrators *against* WEIR.

IN ERROR.

September.

ERROR to the Court of Common Pleas of *Westmoreland* county.

Forward and *Foster*, for the plaintiffs in error.

Alexander, contra.

The omission in a declaration in a suit on a special agreement, to allege specially the breach of the agreement or notice to the plaintiff to perform it, are cured by verdict.

A receipt for the purchase money, indorsed on a deed, is only *prima facie* evidence, and may be rebutted by evidence.

The opinion of the Court was delivered by

DUNCAN J.—The plaintiff below, *Robert Weir*, declared in *assumpsit*. The first count was for 500 dollars, the price of a tract of land, sold by him to *Joseph Weigley*. The second, for money had and received. The third, states a special agreement. It recites, that disputes and controversies had arisen between the said *Robert*, and one *Patrick M'Cormick*, respecting the title of a tract of land, situated on both sides of the path, leading from *Brackins*, near *M'Candles*, in *Wheatfield Township*, *Indiana* county, claimed by the said *Robert*, and the titles and situation of other tracts of land, claimed and held by him in the same township, and the said *Joseph* being a practising attorney of the Court of Common Pleas of *Indiana* county, a certain communication was held between them of and concerning the disputes and controversies aforesaid, and of concerning the said *Joseph's* undertaking the business of the said *Robert*, in the said several matters, to set right, arrange and adjust for him, the matters in dispute and controversy, touching the title of the tract of land aforesaid, to conduct and manage all suits and prosecutions, which might be necessary for effecting the premises, and to adjust and settle for the said *Robert* the disputes and difficulties, then subsisting, regarding the titles of his land in *Indiana* county, upon which communication, it was then and there *agreed in writing*, between them, as follows; *viz.* that the said *Joseph*, in consideration of 105 dollars, secured to be paid by the said *Robert* to the said *Joseph*, then and there undertook and promised by the *writing* aforesaid, faithfully and diligently to manage and conduct the business of the said *Robert*, in the matters aforesaid, and to rectify and ad-

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just the titles of the said *Robert*, to his lands in the said county, and to sue, prosecute, and conduct all suits and actions which might be necessary in and about effecting the said premises. The declaration then states the payment of the 105 dollars, and thus assigns the breach, "that the said *Joseph* hath wholly neglected and refused to perform the said agreement on his part to the aforesaid *Robert*, according to the form and effect thereof, but the same to keep and perform, altogether hath refused, and hath refused to manage and conduct the suits and actions brought by and against the said *Robert*, for the purpose of determining and settling the disputes relative to the said lands, whereby the said *Robert* hath sustained great loss, and hath damage, &c.

The errors assigned, are to the declaration and charge of the Court—the last count. Had this been demurred to, the general statement, that the defendant had not performed his agreement or promise, but refused to do so, would have been insufficient: for the breach of a special contract should be certain and express. Here the plaintiff ought to have set out the disputes and controversies specially, and that he had given notice of them to the defendant, and that he had refused to attend to them; and as the object of the plaintiff was to go for special damages, for damages not necessarily resulting from the breach of the contract, he ought specially and circumstantially, in order to apprise the defendant of the facts intended to be proved, to have stated them, or he would not be permitted to give such damages in evidence on the trial. But the general verdict may have aided the defective breach; the insufficiency of the breach would be aided by the common law intendment, for it is not to be presumed, that the Judge either would direct, or the jury would have given the verdict, without sufficient evidence of the breach of contract. 1 *Chitty Plead.* 332. 1 *Saund.* 228. *Note.* 10. *N. P. Com. Dig. Tit. Plead. C.* So of the notice; the omission of the averment of notice, when necessary, will be fatal on demurrer, or judgment by default, but may be aided by a verdict, unless in an action against the drawer of a bill, where the omission of the averment of notice of non payment by the acceptor is fatal, even after verdict. *Miles* v. *O'Hara*, 4 *Binn.* 108. *Rushton* v. *Aspinall*, *Doug.* 679. 1 *Chitt. Plead.* 322.

The opinion of the Court on the second count, for the

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price of the land, that plaintiff below was estopped by his receipt on the conveyance, from shewing that in fact the purchase money had not been paid, was erroneous. But as this was in favour of the plaintiff, he complains not on that ground; yet this led to the subsequent errors of the Court, in their charge to the jury on the second and third counts. In the case of *Jordan*, v. *Cooper* 3 *Serg. & Rawle*, 564, this question was decided, that such receipt is not either by plea in bar as an estoppel, or in evidence to a jury, conclusive of the fact; that it is *prima facie* evidence, and that not of the most convincing kind; it may be contradicted, and shewn that the money was never paid. Receipts for the purchase money in conveyances, are often given, where nothing may have been at the time paid, or the payment postponed; and we all know that the considerations expressed in conveyances are frequently nominal. But it will be for the defendant in error to consider, when this cause goes back, whether it would not be prudent to alter that count, and instead of a general *indebitatus assumpsit* for lands sold, to lay the contract specially.

The Court, in their charge, put out of view this count, and gave their opinion on the second and third counts. It was in evidence, that *Weigley* had paid at least, ninety-five dollars on account of the land, and that he had executed conveyances to *Weir* of some other lands. If *Weir* went for the purchase money, it must be for the money received by *Weigley*, on the sale of this tract, and on the principle of rescinding the contract. But in order to enable him to recover in this form, it must be rescinded *in toto*, and the party put in *statu quo*. Here this was not done; and though it be true, that where some act is to be done by each party under a special agreement, and the defendant by his neglect, prevents the plaintiff from carrying the contract into execution, the plaintiff may recover back any money he had paid under it, as received to his use, yet in these cases if the plaintiff has received benefit in part, from the original contract, he should declare specially. This was the view taken of it, by the Court of Common Pleas; for they state, if the second count can be supported at all, it must be on the ground of gross fraud, and dereliction of official duty. I cannot see how this could support the action for money had and received,

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unless it be on the ground, that *Weir* had paid *Weigley* five hundred dollars for official services to be performed, which is not pretended, and he had faithlessly refused him the benefit of his services altogether. But the particular direction of the Court to the jury, which is complained of, is this, that in the count on the written contract, they are instructed, that if they believe the plaintiff had been greatly imposed on by the defendant, and that the leading and particular consideration of the deed was, the aid of his professional services, and these had been refused, the verdict should be for the plaintiff, deducting the monies which were actually paid by him, or due to him by the plaintiff, with just allowance for actual services performed; thus making the five hundred dollars the price of the land, the standard of damages, to be received on the special contract. Now on this third count, which seems to be the only one in which the jury were charged, the measure of damages could only be, the injury the plaintiff sustained by the defendant's refusing to perform the written contract. That had no connection with the first count, which had been disposed of by the Court; and on the principles laid down by the Court, there could be no reference to the contract for the land; for the receipt, as they considered it, was conclusive evidence, that the consideration money, five hundred dollars, had been paid. This mistake in the first instance, led to all the subsequent error. In a special count on the contract for the sale of the land, if the defendants did not shew the consideration money paid in money, or by services performed under some agreement, or in mutual account, the plaintiff would in all justice be entitled to recover; for the true question would be, had *Weigley* in any way, paid the purchase money? The receipt in the conveyance is some evidence, but the slightest, and susceptible of contradiction. On the written contract of *Weigley*, the question would be, had he faithfully performed the services he stipulated to perform, and if he did not, what were the damages the plaintiff had sustained?

Judgment reversed, and a *venire facias de novo* awarded.

END OF JUNE TERM, 1821.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

SOUTHERN DISTRICT, OCTOBER TERM, 1821.

LEAZURE *against* HILLEGAS.

Chambersburg.

Monday, October 15.

IN ERROR.

ERROR to the Common Pleas of *Bedford* county.

A paper, purporting to be an original survey, not returned to the office of the surveyor general, but found among the papers of a deceased deputy surveyor, in the hands of his executor, is evidence, if it be proved that the body of the writing and the indorsements were the hand-writing of several persons who had been deputy surveyors or assistant deputy surveyors of the county.

Frederick Hillegas, the plaintiff below, (the defendant in error,) claimed the land in dispute, under a warrant and survey to *Thomas Holt*, who conveyed to *George Armstrong*,

An exemplification certified by the recorder of a county of a deed, conveying lands lying in that and another county, is evidence in a dispute concerning the latter.

A deed under the seal of a banking corporation within this State, incorporated by Act of Assembly, is not evidence, unless the seal be proved. It is not necessary that such proof should be by one who saw the deed sealed; but the impression must be proved by some one who knows the motto, devices, &c.

The Act of 17th March, 1787, enabled the Bank of North America to have, hold, purchase, receive, possess, enjoy, and retain lands, rents, &c., and also to sell, grant, &c. the same lands, &c., provided, that such lands and tenements, which the said corporation was thereby enabled to purchase and hold, should only extend to such lot and lots of ground and convenient buildings, &c. as they might find necessary for carrying on the business of the said bank, &c. and should actually occupy; and to such lands and tenements which were or might be *bona fide* mortgaged to them as securities for their debts. *Held*, that the bank might purchase absolutely lands in a distant county which they did not occupy, though their title, like that of an alien, is defeasible by the Commonwealth; and if they convey to a third person without claim by the Commonwealth, such third person holds the same estate defeasible in like manner.

Where the Court below, after a preliminary inquiry, admit evidence of a writing alleged to be lost, it must be a strong case, to induce this Court to interfere in error.

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who conveyed to *William Henry*, who conveyed to the *Bank of North America*, who conveyed to the plaintiff. On the trial of the cause, four bills of exceptions to evidence, were taken by the defendant below.

1. The first exception was to a paper purporting to be the original survey, not returned to the office of the surveyor general, but found among the papers of *George Woods*, deceased, formerly deputy surveyor of *Bedford* county, in the hands of *Henry Woods*, one of his executors. It was proved that the body of the writing and the indorsements on this paper, were of the hand-writing of several persons, deceased, who had been deputy surveyors, or assistants to the deputy surveyor of *Bedford* county, and upon this evidence, the Court permitted it to pass to the jury.

2. The second exception was to the admission of an exemplification of a deed from *William Henry* and wife, to the *President, Directors and Company of the Bank of North America*, certified by the Recorder of deeds for the county of *Huntingdon*. This deed contained a conveyance of lands lying in the county of *Huntingdon*, and also of the lands now in dispute, which lay in the county of *Bedford*.

3. The third exception was to the admission of a deed, from the *Bank of North America* to *James Ross*, to which there were two objections: 1st. That there was no evidence of the seal of the corporation: 2d. That the corporation was incapable of receiving a conveyance of land otherwise than by mortgage, and therefore had no estate which could be conveyed.

4. The fourth and last exception was to the deed from *James Ross*, by *John Anderson* his attorney, to the plaintiff. The objection was, that the power of attorney was not produced, nor good reason shewn for not producing it. The Court heard the evidence on that point, and being of opinion that there was sufficient proof of the existence of the power and its loss, suffered its contents to be proved by parol evidence.

This case was twice argued, first by *Tod*, for the plaintiff in error, and *J. Riddle*, for the defendant in error: and on the second argument by *Tod*, for the plaintiff in error, and *Thompson*, for the defendant in error.

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Arguments for the plaintiff in error.

1. The survey was improperly admitted in evidence, in as much as it was not found in any public office, nor was there any proof that it was, at any time in a public office. It is true it is in the hand-writing of a public officer, the deputy surveyor, but that might have occurred when he was not in office. The writing and indorsements are by different persons, who could not all have acted officially. Its being found in the hands of one of his executors, is a strong presumption that it was not considered by Mr. *Woods* as an official paper; for if he had so considered it, he would have returned it to the office, or delivered it to his successor.

2. The objection that the exemplification of a deed recorded in *Bedford* county, was not evidence as to lands in *Huntingdon* county, such recording being unauthorised by the recording acts, though made on the first argument, was in a great measure, relinquished on the second.

3. It was contended, that the deed from the *Bank of North America* to *James Ross* was not evidence. In the first place, the seal of the bank was not proved, and no private corporate seal proves itself: it must be shewn by other evidence that it is what it purports to be. It must be proved like other deeds: and without such proof, the Court cannot take notice of it. *Jackson* v. *Pratt*, 10 *Johns.* 381. *Peake's Ev.* 48. note 2. 72. In the second place, this bank was erected by an Act of Assembly, passed on the 17th of *March*, 1787, which expressly regulates and restricts the bank, as to the ability to purchase and to hold real estate. The 3d sect. enacts, that it shall be capable "to have, hold, purchase, receive, possess, enjoy and retain lands, rents, tenements, goods, chattels and effects, of whatsoever kind, nature or quality, to the amount of two millions of dollars, and also to sell, grant, &c. the same lands, rents, &c. *provided nevertheless*, that such lands and tenements, which the said corporation are hereby enabled to purchase and hold, shall only extend to such lot and lots of ground, and convenient buildings, and improvements thereon erected, as they may find necessary and proper, for carrying on the business of the said bank, and shall actually occupy for that purpose, *and to such lands and tenements which are, or may be, bona fide mortgaged to them as securities for their*

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debts." Being created by the Act of Assembly, and merely creatures of the law, corporations can act only in the mode prescribed: they can take property or grant it, only according to their charter. The deed in this instance was an absolute conveyance to the bank, not by way of mortgage, and of property at a great distance from the place where they carried on their business. It was, therefore, null and void in its operation: it conveyed no property to the grantees, as they were not competent to take, and it ought not to have gone to the jury. They cited 2 *Bac. Ab.* 8. *Corporation*, *D. Ib.* 13. *E.* 2. 2 *Cranch*, 126. 166. 2 *Johns.* 109. 1 *Caines*, 381. 2 *Johns.* 114.

4. Sufficient search was not made for the power of attorney. *Hillegas*, the grantee, ought to have been examined as a witness. The power was searched for only after the jury were sworn. It was not well proved to have been acknowledged, nor was there sufficient search for the subscribing witnesses.

Arguments for the defendant in error.

1. If this were a new point, it might be considered doubtful. But the point has often been determined. The Courts of this State, considering the situation of the public affairs, have found it necessary for the attainment of justice, to admit such evidence. The field notes of surveyors have even been examined, in order to illustrate matters in dispute. This paper was the work of officers, who were dead before this dispute arose, and it is of no consequence that it was not found in a public office, as the hand-writing is proved to be that of public officers.

2. The deed being once legally on record, became evidence every where, because the officer who recorded it, was to judge of the authenticity of the acknowledgment.

3. As to the objection to the seal, the seal was notorious, and the custom had been to receive seals of public institutions, chartered by a law of the State, as proving themselves: so that it had become the common law of the country. The objection to the capacity of the corporation to receive a conveyance, involves important common law principles. Like an alien, the corporation might take and hold, until advantage is taken of the forfeiture by inquest of office.

It was further contended, that the deed might properly be considered in nature of a mortgage, and thus come within the provisions of the Act of Assembly.

The opinion of the Court was delivered by

TILGHMAN, C. J.—*Frederick Hillegas*, the plaintiff below, (who is defendant in error,) claimed the land in dispute under a warrant and survey to *Thomas Holt*, who conveyed to *George Armstrong*, who conveyed to *William Henry*, who conveyed to the *Bank of North America*, who conveyed to *James Ross*, who conveyed to the *Plaintiff*. On the trial of the cause, several exceptions were taken to the opinion of the Court on points of evidence, on which exceptions this Court is now to decide.

1. The first exception was to a paper purporting to be the original survey, not returned to the office of the surveyor general, but found among the papers of *George Woods*, deceased, formerly deputy surveyor of *Bedford county*, in the hands of *Henry Woods* one of his executors. It was proved, that the body of the writing, and the indorsement on this paper, were of the hand-writing of several persons deceased, who had been deputy surveyors or assistants to the deputy surveyor of *Bedford* county; and upon this evidence, the Court permitted it to go to the jury. The Court have been very liberal in admitting evidence of this kind; so much so indeed, that I do not see how, without inconsistency, this paper could have been excluded. It ought, to be sure, after the death of *George Woods*, to have been delivered by his executors, to his successor in office. But it is very common for deputy surveyors to intermix their private, with their official papers, and it would be unjust that a third person, who was obliged to have his survey made by the officer, should suffer by this kind of negligence. The material point to be ascertained, was, whether the survey was an official act; of that, the jury were to judge. The paper in question was not conclusive evidence of a survey, but I think the preliminary evidence justified the Court in permitting it to be laid before the jury.

2. The second objection was, to the admission of an exemplification of a deed from *William Henry* and wife, to the *President, Directors, and Company of the Bank of North*

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America, certified by the recorder of deeds for the county of *Huntingdon*. This deed contained a conveyance of lands, lying in the county of *Huntingdon*, and also of the lands now in dispute, which lie in the county of *Bedford*. Evidence of this kind has been admitted by the Judges of this Court, at *Nisi Prius*, and was determined to be admissible, by the Circuit Court of the *United States* for the district of *Pennsylvania*, in the case of *M'Keen* v. *Delancy's Lessee*, which was carried up to the Supreme Court of the *United States*, and affirmed on a writ of error. *5 Cranch*, 22. Indeed I consider this exception as having been abandoned, and very properly, by the plaintiff in error, on the second argument of this cause. The deed was legally recorded in *Huntingdon* county, because it contained a conveyance of land in that county; and being legally recorded, its whole contents became legal evidence in every part of the State. But although legal evidence, it does not follow that it would be preferred to a subsequent deed made to a purchaser without notice, for those lands which lie in *Bedford* county, which should be recorded in *Bedford* county. That is quite a different question, and I mention it, lest an improper inference should be drawn from the point now decided.

3. The third exception was, to the admission of the deed from the *Bank of North America* to *James Ross*, to which there were two objections, first, that there was no evidence of the seal of the corporation; and second, that the corporation was incapable of receiving a conveyance of land, otherwise than by mortgage, and therefore had no estate which could be conveyed. The first exception was good. A corporation is an imaginary being; a creature of law, which cannot act otherwise than as prescribed by law. Its deeds are authenticated by its common seal, but that seal must be proved. It is not one of those public matters, of which individuals are bound to take notice. I do not mean, that the affixing of the seal must be proved by a witness who was present, and saw it done. But the seal itself, that is the impression, must be proved by some person who knows the device, motto, &c. No evidence of that kind was offered, and therefore the deed ought not to have been read to the jury. In support of this opinion, I refer to the case of *Jackson* v. *Pratt*, decided by the Supreme Court of *New York*,

10 *Johns.* 381, and *Peake's Law of Evidence*, 48, note, and 72.

But the great points in this cause are, the capacity of the bank to *take* the land conveyed by *William Henry's* deed, and afterwards to *convey* the same to *James Ross*. There is no doubt that a corporation must be governed by the charter, from which it derives its existence. It can do no act nor take any estate contrary to its charter. If therefore it can be shewn, that the *Bank of North America*, is forbidden by its charter, either to *take*, or to *convey*, the land contained in *William Henry's* deed, the plaintiff's action cannot be supported. By the 3d section of the Act of Incorporation, (17th of *March*, 1787, 2 *Sm. L.* 399,) the bank is made capable "to have, hold, purchase, receive, possess, enjoy, and retain, lands, rents, tenements, goods, chattels, and effects of whatsoever kind, nature or quality, to the amount of two millions of dollars and no more, and also to sell, grant, &c. the same lands, &c. Provided nevertheless, that such lands and tenements, which the said corporation are hereby enabled to *purchase* and *hold*, shall only extend to such lot and lots of ground, and convenient buildings, and improvements thereon erected or to be erected, which they may find necessary and proper for carrying on the business of the said bank, and shall actually occupy for that purpose, *and to such lands and tenements which are or may be bona fide mortgaged to them as securities for their debts.*" It is remarkable, that with regard to the *holding* of lands, the charter of this bank is more restricted than that of any other bank in the State, for all the others are enabled to hold, not only the lands which have been *bona fide* mortgaged to them by way of security for debts, but also those, "which may be conveyed to them in satisfaction of debts previously contracted in the course of their business, or purchased at sales upon judgments which shall have been obtained for such debts." This difference of restriction, must have arisen from the extreme jealousy of monied corporations which pervaded the mind of the Legislature when the *Bank of North America* was incorporated. It never could have been intended to place that bank on a worse footing than others, for it was the only one, which risked its capital on a field altogether untried in *America*, and which had the merit of rendering essential service to the

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United States, during the war of the revolution. It would be improper therefore, to carry the restriction, *by construction*, farther than the words of the law plainly import. The restriction is, that the bank shall not *purchase and hold*. *Purchasing and holding*, are very different things, and the consequences of each are very different. If the words had been, that the bank should neither purchase nor hold, then it could have done neither one nor the other. But although *purchasing and holding*, might have been thought dangerous, because of the power which it would have given the bank to bring too much land into *mortmain*, yet to *purchase*, subject to the statutes of *mortmain*, which authorised the Commonwealth to appropriate the land to its own use, could be attended with no danger. This construction would satisfy the jealous policy of the Legislature, preserve the community from the danger of too great a mass of real property held in *mortmain*, and at the same time put it in the power of the Commonwealth to act towards the bank, as justice might seem to require. This is a consideration of no small importance; for when the directors of the bank accepted from *William Henry*, a conveyance of his land at a fair price, in payment of a debt *bona fide* due, it would be hard to presume, that they knew they were acting in violation of their charter. But granting that the restriction in the charter, did not extend to the simple act of *purchasing*, it may be asked, whence did the corporation derive the *right to purchase*, and what would be the situation of land purchased, without a capacity of holding. The answer is, that a corporation, has, *from its nature*, a right to *purchase* lands, though the charter contains no licence to that purpose. And in this respect the statutes of *mortmain* have not altered the law, except in case of *superstitious uses*. But since those statutes, it is necessary, in order to enable a corporation to *retain* lands which it has purchased, to have a license for that purpose; otherwise, in *England*, the next lord of the fee may enter within a year after the alienation, and if he do not, then the next immediate lord, from time to time, has half a year to enter, and for default of all the *mesne* lords, the king takes the land so aliened, for ever. That this is the law appears from the following authorities. 2 *Black. Com.* 268, 269. *Co. lit.* 2. 6 *Vin. Ab.* 265. (*G. pl.* 2.) *id.* 266. *pl.* 8. *Jenk. Cent.* 270.

3 *Com. Dig.* 399. (*F.* 10.) *id.* 401. (*F.* 15.) 1 *Rol. Ab.* 513. 1. 35. 10 *Co.* 30. But in *Pennsylvania*, where there are no *mesne* lords, the right would accrue immediately to the Commonwealth. It has been objected however, that according to the report of the Judges of this Court, made on the 14th *December*, 1808, in pursuance of an Act of Assembly requiring them to make a report of the *English* statutes which are in force in the Commonwealth, &c., it appears, that all conveyances of land to a corporation, without licence, are absolutely void. I will consider this objection. The Judges reported the following statutes of mortmain, "7 *Ed.* I. (*Stat.* 2.) 13 *Ed.* I. *ch.* 32. 15 *Rich.* II. *ch.* 5, and 23 *Hen.* VIII. *ch.* 10; which are in part inapplicable to this country, and in part applicable, and in force. They are so far in force, that all conveyances by deed or will, of lands, tenements, or hereditaments, made to a body corporate, are void, unless sanctioned by charter or Act of Assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity or utility." I have quoted the words of the report, and it is evident that the Judges could have no intent, nor had they power to make any addition to the statutes, or in any manner to alter them. Now by reference to the statutes, it will appear, that in all of them, except the 23 *Hen.* VIII. *ch.* 10; the conveyance is not absolutely void, but the estate passes to the corporation, subject as before mentioned, to the right of the several *mesne* lords, and in their default, of the king, to enter and hold in fee. But by the statute of 23 *Hen.* VIII. ch. 10, (which has been determined to extend to *superstitious uses only*, see 2 *Black. Com.* 273. 1 *Co. Rep.* 24,) uses and trusts, made and contrived in favour of religious persons, or any bodies corporate, for more than twenty years, shall be utterly void. Now the meaning of the report of the Judges is, that, according to the statute cited by them, conveyances to *superstitious* uses, are absolutely void, and conveyances to corporations, to uses *not superstitious*, are so far void, that those corporations shall have no capacity to hold the estates for their own benefit, but subject to the right of the Commonwealth, who may appropriate them to its own use at pleasure; in other

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words, that such conveyances have no validity for the purpose of enabling the corporation to hold in mortmain. But to support the plaintiff's title, it must be shewn that the corporation had power, not only to take by purchase, but to *alien*. In this respect I consider a corporation in the situation of an alien, who has power to take, but not to hold. That an alien may take by purchase, (though not by descent,) has been settled from the earliest times. It is so laid down in *Co. Lit.* 2, and I believe has never been questioned. Neither has it been questioned, that the land is subject to forfeiture, and may be seised for the king, after office found. But it has been questioned, what is the right of the alien before office found for the king. Without reference to *English* cases, which leave the matter in doubt, we have the highest authority in our own country for saying, that until some Act done by the Commonwealth according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser, but he can convey no estate which is not defeasible by the Commonwealth. This principle was asserted by Judge STORY, who delivered the opinion of the Supreme Court of the *United States*, in the case of *Fairfax's Devisee* v. *Hunter's Lessee*, 7 *Cranch*, 603; and this was the opinion of the Supreme Court of *Massachusetts*, in the case of *Sheafe* v. *O'Neil*, 1 *Mass. Rep.* 256, cited by Judge STORY. It is reasonable in theory, and can have no ill effect in practice, that he who has a defeasible estate, may convey a defeasible estate. Provided the right of the Commonwealth to defeat the estate granted by the alien remains entire, it is immaterial who holds the land until that right be prosecuted. Supposing then, that the cases of the alien, and the corporation be similar, (and I see not how they can be distinguished,) it follows that the deed, from the *Bank of North America* to *James Ross*, conveyed a fee simple, defeasible by the Commonwealth. The counsel for the plaintiff did indeed contend, that this deed might be considered as a mortgage, though on its face it appears to be an absolute conveyance. But this construction cannot be supported. In order to carry the intent of the grantor into effect, a deed intended to operate as one species of conveyance, may be construed to operate as another, provided it contain words sufficient. But it cannot be construed so as

to *destroy* the intent of the parties, as would be the case by holding this deed to be a mortgage; for it was the clear intent of both parties to make an absolute sale, and not a mortgage. When *William Henry* conveyed the lands mentioned in his deed, it was his intent, that in consideration thereof, the debt due from him to the bank should be extinguished, and the bank agreed to accept the conveyance in satisfaction of the debt. But supposing it to be a mortgage, the debt would be extinguished, and *Henry* would still remain responsible. I am clearly of opinion therefore, that it was not a mortgage, but an absolute conveyance.

4. The fourth and last exception in this cause was, to the deed from *James Ross* by *John Anderson* his attorney, to the plaintiff. The objection was, that the power of attorney was not produced, nor good reason shewn for not producing it. The Court heard evidence on that point, and being of opinion that there was sufficient proof of the existence of the power, and of its loss, suffered its contents to be proved by parol evidence. In matters of this kind, where the Court below goes into a preliminary inquiry before it decides upon the admissibility of written evidence, it must be a very strong case which would induce this Court to decide that there was error. Such a case is not presented on this record, and therefore without criticising the parol evidence, I will only say, that the fourth exception does not appear to me to be supported.

Upon the whole, I am of opinion, that there was error, in admitting the deed from the *Bank of North America* to *James Ross* without proof of the corporate seal, and that there is no other error in the record. The judgment is therefore to be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

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GURLY *against* The Gettysburg Bank.

IN ERROR.

Monday, October 15.

The reasonableness of notice to an indorser, of the non payment of a promissory note is a question of fact, to be submitted to the jury. No general rule can be laid down by the Court on the subject.

ERROR to the Court of Common Pleas of *Adams* county.

James Gurly, the defendant below, was the indorser of a promissory note, drawn by *Richard Brown* in his favour, dated the 19th of *December*, 1815, and payable in 120 days from the date, which was discounted by the *Gettysburg Bank*. A payment in part was made on the 20th of *April*, 1816, and the note was, on the same day, regularly protested. Notice of the non payment of the residue was given to *Gurly*, on the 25th of *April*, 1816, and a demand made on him. In *September* following, another portion of the note was paid, and this suit was brought by the Bank to *November* Term, 1816, to recover the balance. Several questions were raised in the Court below, but eventually, the only point on which this Court were called on to express their opinion was, in relation to a part of the charge of the Court below, which was excepted to by the defendants below, and was as follows. "As to the first point on which our opinion is requested, we say, that the law respecting notice, is founded on particular circumstances. Therefore, the law which is reasonable in *London*, or in any of our large cities, would not be suitable and convenient in many parts of the country. One day in *London* is said to be too great a lapse of time in giving notice to an indorser of non payment by the drawer. This strictness in the country is often entirely impracticable. The rule, therefore, must of necessity be varied, and it must be varied to suit the particular circumstances of the case. The distance, the state of the roads, &c., are facts, that must be taken into the calculation. *The reasonableness of the notice therefore, depending on the decision of facts, must be left to your determination under all the circumstances.*"

Dobbins, for the plaintiffs in error, now contended, that

whether the notice was reasonable or not, was matter of law, and that five days was too long to wait before giving notice to the indorser. He cited, *Chitt. on Bills*, 224, 225. 237. 280. *Taylor* v. *Bryden*, 8 *Johns.* 133. 11 *Johns.* 187. *Ireland* v. *Kip*, 11 *Johns.* 231. *Hussey* v. *Freeman*, 10 *Mass. Rep.* 84. *Fisher* v. *Evans*, 5 *Binn.* 541. *Barton* v. *Baker*, 1 *Serg. & Rawle*, 334. *Act Regulating Banks*, passed *March* 21st, 1814, *Purd. Dig.* 59.

M'Conachy, contra, contended, that reasonableness of notice to the indorser of a promissory note is, by the law of *Pennsylvania*, matter of fact, to be decided by the jury, and cited *Robertson* v. *Vogle*, 1 *Dall.* 252, (1788.) *Bank of North America* v. *M'Knight*, 2 *Dall.* 158, (1792.) *Mallory* v. *Kirwan*, 2 *Dall.* 192, (1792.) *Bank of North America* v. *Pettit*, 4 *Dall.* 127, (1793.) *Warder* v. *Carson's Executors*, 1 *Yeates*, 531, (1795.)

The opinion of the Court was delivered by

Tilghman, C. J.—This was an action on the case, on a promissory note, for fifteen hundred dollars, dated 19th *December*, 1815, drawn by *Richard Brown*, payable to *James Gurly*, the defendant below, 120 days after date, indorsed by the said *Gurly*, and discounted by the *Gettysburg Bank*. On the trial of the cause, a question arose, on the reasonableness of the notice of non-payment by the drawer, given by the bank to the defendant. The Court submitted that matter to the decision of the jury. It is contended, that it ought not to have been left to the jury, but decided by the Court as matter of law. That reasonableness of notice is not simply matter of law is evident, because it must depend upon facts, such as the distance of the parties from each other, the course of the post, and sometimes unavoidable accidents, which the Court cannot decide. The prevailing opinion in *England* seems to be, (and it is so stated in *Chitty on Bills*, 178, *Philadelphia Edition*, 1809,) that it is a question partly of fact, and partly of law. Yet the law can hardly be considered as settled, even in *England*, as great authorities are opposed to each other. Lord Mansfield laid down the rule, in the case of *Tindall* v. *Brown*, that the jury were to decide the facts of the case, and the Court to determine,

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whether on those facts, the notice was reasonable. But this rule was unequivocally disapproved of by Lord KENYON, in *Hilton* v. *Shepherd*, and *Hopes* v. *Alder*, both reported in 6 *East*, 14, 15, 16, notes. That it will ultimately settle down into Lord MANSFIELD's rule, in *England*, is highly probable, as the power of juries in that country, seems to be gradually passing over to the Courts. But as reasonableness of notice had not been decided to be matter of law in the *English* Courts, while the *United States* remained part of the *British* empire, and their subsequent decisions have not the force of authority here, it is to be considered what have been our own decisions, for it will be found to be a subject which the Courts of *Pennsylvania* have frequently had under consideration. In *Robertson* v. *Vogle*, 1 *Dall.* 252, the point came before the Court of Common Pleas of *Philadelphia*, when the late C. J. SHIPPEN was President of that Court, and it was held, that reasonable time of notice was matter to be submitted to the jury. The same principle was adopted by M'KEAN C. J., in the *Bank of North America* v. *M'Knight*, 2 *Dall.* 158. YEATES and BRADFORD Judges, held the same opinion at *Nisi Prius*, in *Mallory* v. *Kirwan*, 2 *Dall.* 192. The Supreme Court decided in the same way, in the *Bank of North America* v. *Pettit*, 4 *Dall.* 127. The last of our reported cases on this subject, is *Warder et al.* v. *Carson's Executors*, 1 *Yeates*, 531, and the language of M'KEAN C. J., who delivered the opinion of the Court, is worthy of great consideration, as it establishes a distinction between notes discounted by the banks in *Philadelphia*, and other notes, which appears highly reasonable. "Our trade and usages," says he, "are not so well fixed, as to admit those strict rules, and for the reasons given in *Robertson* v. *Vogle*, such strictness would be dangerous and inconvenient. No decision that we know of, amongst us, has fixed any general rule, and the question respecting reasonableness, &c., has been left to the jury. Indeed, in suits brought by the banks, against indorsers of promissory notes, we have gone so far as to say, that as they themselves have adopted the practice of giving notice to indorsers within six or seven days at farthest, where the parties live in the city, this usage shall be obligatory on them, and that a further delay will discharge the indorser." Without undertaking to say pre-

cisely, what is the practice of the banks in this city, I am confident that they give notice *now* in a much shorter time than five or six days. And the fact is capable of being so exactly ascertained, that there will be little difficulty, when a case occurs, in settling the law with regard to them. But I am satisfied, that an attempt to lay down any general rule at this time, applicable to all notes discounted in the country banks, would be unjust and dangerous. The practice of giving notice, has been different, in different banks, espepecially in cases where the indorsers do not live in the town where the bank is kept. And as to individuals in the country, who hold indorsed notes, never discounted by any bank, I am well assured, that there is no general understanding, of any particular time of giving notice. How then can the Court fix the time? The common law has no rule on the subject. And in those countries where the greatest commercial strictness prevails, the Courts have never undertaken to establish a rule, until they found the course of business so well settled, as to afford them a basis. Even in our greatest commercial cities, which have sometimes been subject to alarming epidemic disorders, the Courts have found themselves reduced to the necessity of submitting to juries, (often better informed in these matters than themselves,) what should be a reasonable allowance for the circumstances of the time, in questions of notice with respect to promissory notes, bills of exchange, and policies of insurance. I have forborn to take notice of the decisions of the Supreme Courts of *New York* and *Massachusetts*, not that I have not the most unfeigned respect for them, but because we are bound to pay still greater respect to our own decisions, which have not been in exact accordance with them. Upon the whole, I am of opinion, that we cannot say there was error in this case, without a premature and dangerous departure from all former precedents in this Commonwealth. The judgment of the Court of Common Pleas is therefore to be affirmed.

Judgment affirmed.

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Chambersburg.

COYLE heir of COYLE and O'CONNER terre tenant *against* REYNOLDS and another executors of REYNOLDS.

Monday, October 15.

IN ERROR.

In a *scire facias* against the heir and terre tenant, on a judgment against the ancestor, judgment entered generally without specifying the lands which it is to affect, is valid under the practice in Pennsylvania, and binds only the lands of the ancestor in the hands of such heir or terre tenant, and if the plaintiff attempts to enforce it against them personally, the Court may interfere in a summary manner.

ERROR to the Court of Common Pleas of *Franklin* county.

William Reynolds and *James Campbell*, executors of *John Reynolds*, deceased, brought this *scire facias* in the Court below, against *George Coyle*, heir of *Henry Coyle*, and *David O'Conner* terre-tenant, on a judgment against the said *Henry Coyle*, entered at *March* Term, 1787. Several errors were assigned in the course of the argument in this Court, but they were all abandoned except one, which was, that the jury did not find any lands bound by the judgment in the hands of either of the defendants, and the judgment on the *scire facias* was entered in such a manner as to affect the defendants personally. The defendants below pleaded payment; and *O'Conner* also pleaded for himself, that "he was a purchaser for a valuable consideration, and stood protected by law," and issues were joined on these pleas. The jury found for the plaintiffs, and the judgment was entered generally.

It is no objection to a verdict on such *scire facias*, that the jury did not specify the lands in the hands of the heir or terre tenant, if they pleaded nothing to bring that point before the jury.

Dunlop and *M'Cullough*, for the plaintiffs in error, objected to the entry of the judgment, as erroneous and defective, inasmuch as it rendered the defendants personally liable, in a case where only the property of the original defendant, which was in their possession, ought to be bound, and that the judgment should have been specially entered to that effect. The jury ought to have ascertained the property, so as to regulate the judgment. 2 *Saund.* 7. *note* 4. *Lill. Ent.* 289. 2 *Saund.* 17. *Herbert's Case*, 3 *Co.* 12. *Poph.* 153. *Phill. Evid.* 294. 5 *Com. Dig. Pleader, S.* 20.

Chambers, contra, cited 2 *Tidd.* 1032. 1 *Esp. N. P.* 2d *part*, 89.

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COYLE and another v. REYNOLDS' executors.

The opinion of the Court was delivered by

TILGHMAN C. J.—This was a *scire facias* against the heir and terre tenant of *Henry Coyle*, deceased, on a judgment against the said *Henry*, entered at *March* Term, 1787. Several errors were assigned, but in the course of the argument they were all very properly relinquished but one—which was, that the jury did not find any lands bound by the judgment, in the hands of either of the defendants, and that the judgment on the *scire facias* is entered in such a manner as to affect the defendants personally. If that were even the case, the defendants would have themselves to blame for it, because they did not plead any thing which brought that point before the jury. They pleaded *payment*, and besides, *O'Conner* pleaded for himself, "that he was a purchaser for a valuable consideration, and stood protected by law." A singular plea to be sure; for what protection did the law afford to a man who purchased land bound by a judgment? However, the defendants need not be unnecessarily alarmed—the judgment is entered in a short memorandum, as all our judgments are, and when reduced to form, will only affect the land bound by the judgment. It is too late for this Court to attempt now to correct a mischievous and inveterate practice, which has entered into the system and very heart of our titles to land. Our judicial proceedings framed in the unsuspecting simplicity of early times, with a view of avoiding expense, or saving trouble, have been so short, as to be obscure; so loose, as to be uncertain. The prothonotary writes the word *judgment*, and that is all we have for it. But what that judgment is, the Courts, as they are called on from time to time, must explain. This Court has considered itself bound in duty to support judgments as far as possible, where every thing appeared fair and honest. In writs of *scire facias* against heirs, and terre-tenants, it has been very common not to specify the lands of which execution is demanded. The *scire facias* directs the Sheriff, to make known, &c., to the terre tenant of all the lands held by the defendants at the time of the judgment, and the Sheriff returns, that he has made known, &c., to certain persons, naming them, but not describing the lands held by them. The short entry of judgment against those persons, is construed to relate only to the lands in their possession, which were bound

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by the original judgment, and not to affect them personally. I am sensible that this is an inconvenient way of conducting the business, and am very sorry for it. But so it must remain, until the Legislature interfere; for this Court cannot make an alteration, without affecting *past transactions;* which would disturb the quiet of the State. All that we can do, is, to protect all persons, as far as possible, from suffering by any misconstruction of the judgments which are entered, or by any abuse which may be attempted to be made of them. In general, the pleadings, issue, and verdict, shew plainly enough, what the judgment ought to be. In the case before us, considering the practice which has prevailed, I think it sufficiently clear that the judgment affects not the persons of the defendants, but operates only on the lands which were in the tenure of them, or either of them, and were held by *Henry Coyle*, deceased, at the time the original judgment was entered against him. Should the plaintiffs attempt to injure them, by taking an execution against *any other lands*, or against *their persons*, the Court will interfere, and do justice in a very summary way. I am therefore of opinion, that the judgment should be affirmed.

Judgment affirmed.

DUNCAN J. gave no opinion, having been counsel in the cause.

CREEK and another *against* MOON and another.

Monday, October 15.

IN ERROR.

A survey made by a person, not appearing to have been a deputy surveyor, of land not comprehended within the Act of 8th April, 1785, returned into office and accepted, and a patent issued thereon, is valid.

A survey in 1783, of 328 acres, on a warrant for 150 acres, to the prejudice of the improvement right of a third person, to 300 acres, which improvement was made prior to the survey, is bad.

ERROR to the Court of Common Pleas of *Cumberland* county.

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Chambersburg.

CREEK and another v. MOON and another.

This was an ejectment for 200 acres of land in *Cumberland* county, brought by *Gilbert Moon* and *Philip Leonard*, defendants in error, and plaintiffs below, against *John Creek* and *Catherine Creek*. The plaintiffs below claimed under a warrant to *John Ramsay*, dated the 6th *February*, 1775, "for 150 acres of land, adjoining his other land, and land of *Alexander Power*, in *Rye* township, *Cumberland* county, interest to commence 1st *March*, 1772." On this warrant a survey of 328 acres and 112 perches, with the usual allowance, was made by *James Harris*, on the 12th *March*, 1783, and returned on the 4th *April*, 1783. *Ramsay* conveyed to *Jonathan Williams*, on the 25th *March*, 1783, and a patent to *Williams* was issued on the 14th *April*, 1783. He conveyed to *John Field* and *Mordecai Lewis*, in trust for his creditors, by deed dated the 7th *April*, 1787, and *John Field*, who survived *Mordecai Lewis*, agreed to sell and convey to *Philip Leonard*, by articles dated the 11th *October*, 1811. *Philip Leonard*, executed a declaration of trust to *Gilbert Moon*, on the 18th *December*, 1811.

The defendants made title, under a warrant to *Patrick M'Gary*, dated the 18th *November*, 1803, "for 300 acres of of land, *including an improvement*, adjoining lands of *John Ramsay*, &c., interest to commence 1st *March*, 1771." Parol evidence was given of an improvement by *John M'Lane*, about the year 1771, not on the land in dispute, but near it; and supposing the defendants to be entitled to 300 acres by virtue of that improvement, they might include the disputed lands in their survey. The defendants endeavoured to connect their title with *M'Lane's* improvement, and gave evidence for that purpose. On the other hand, the plaintiffs also gave evidence to shew, that the land in dispute belonged to *Ramsay*, who had made an improvement on or near it in 1772; and, in order to destroy the title set up by the defendants under *M'Lane*, they gave evidence tending to prove, that *M'Lane* made his improvement on 100 acres of land purchased by him of *Ramsay*, and that these 100 acres included no part of the land in dispute, and *M'Lane* never made any claim to them.

The defendants' counsel requested the Court to charge the jury on the following, among other points.

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1. That the granting a patent to *Williams*, was *prima facie* evidence, that the prerequisites to the obtaining of a patent had been complied with; but that it is only *prima facie* evidence, and the defendants may prove that the prerequisites have not been complied with. That if the survey made by *James Harris* was a private one, and not intended to be returned into the surveyor general's office, the patent to *Williams*, issued improvidently and erroneously, and vested no title in the plaintiffs, or those under whom they claimed.

2. That on a warrant granted the 6th *February*, 1775, for 150 acres, and a survey on the 12th *March*, 1783, on such warrant, when an adverse claim existed, 328 acres, and 112 perches and allowance, could not be surveyed, though done by a legal officer.

The Court charged on these points, as follows.

1. The granting a patent to *Williams* was *prima facie* evidence that the prerequisites to the obtaining a patent had been complied with; but it is only *prima facie* evidence, and the defendants may prove that the prerequisites had not been complied with. If the survey made by *James Harris* was a private one, and not intended to be returned into the surveyor general's office, this alone would be insufficient; but in connection with all the other circumstances, we think the patent vested a sufficient title in *Williams*, and those claiming under him, on which to authorise the plaintiffs to recover.

2. On a warrant granted on the 4th *February*, 1775, for 150 acres, a survey of the 12th *March*, 1783, for 328 acres, 112 perches and allowance, if returned, accepted, and a patent granted, is valid, although an adverse claim have existed at the time predicated on an adjacent improvement. No complaint having been made from 1783, it may be presumed such claim is relinquished.

The defendants excepted to the charge of the Court.

Parker and *Tod*, for the plaintiffs in error, contended,

1. That the land officers had no right to grant a patent upon a private survey. The Act of 9th *April*, 1781, sect. 3, declares, that "the surveyor general shall have power to appoint a deputy or deputies in any county of this State, who

shall have power to make and return into the land office, surveys only in the county for which such deputy or deputies shall be appointed, for the conduct of which deputy or deputies, the said surveyor general shall be responsible." This act does, substantially forbid a survey to be executed and returned by any but the surveyor of the district. It is binding on the officers of the land office, and they had no right to depart from or dispense with it. They cited *Bixler* v. *Baker*, 4 *Binn.* 213.

2. Though by the practice of the land office, and the decisions of the Courts, the party may survey more than a surplus of ten per cent. on the quantity contained in a warrant issued since 1767, yet it is well settled, that he cannot do so to the prejudice of a third person, who has an interfering claim. The law on this subject is fully stated in *Kyle's Lessee* v. *White*, 2 *Sm. Laws*, 164. *Steinmetz* v. *Young*, *Ib.* 166. *Blair* v. *M'Fee*, *Pittsburg*, 1820, 6 *Serg. & Rawle*, 193.

Metzgar, contra.

1. The land office having accepted the survey, it is immaterial who made it. It is binding on the Commonwealth. In *Harris's Lessee* v. *Monk*, 2 *Serg. & Rawle*, 557, it is held, that the surveyor general may appoint a special agent to execute a survey, whether that agent were a deputy surveyor or not.

2. The Court is to be understood as leaving it to the jury to judge, whether there had been an abandonment of the adverse claim or not. If there was, the case was the same as if there had never been an adverse claim, and, in that case, the survey would have been good, according to the principles decided.

The opinion of the Court was delivered by

TILGHMAN C. J. [After stating the points of the case.]—On these points of *fact*, the parties were at issue before the jury, and in the course of the trial, several matters of *law* were submitted to the Court, and decided by them, to which the counsel for the defendants excepted. These exceptions may be reduced to two heads.

1. The defendants contended, that at the time the plaintiffs' survey was made, *James Harris* was not deputy sur-

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veyor of that, or of any other district, and consequently the survey was void, and could not be made good by the acceptance of the surveyor general and the patent.

2. They contended, that the quantity of 328 acres and 112 perches, could not lawfully be surveyed on a warrant for 150 acres, nor could such a survey be confirmed, by acceptance, and patent, to the prejudice of a third person, who claimed under an improvement made prior to the survey.

On both points the opinion of the Court was against the defendants.

1. As to the first point. This survey does not fall within the provision of the 15 sect. of the Act of 8th *April*, 1785, by which it is declared, *that every survey made by any deputy surveyor, out of his proper district, shall be void and of no effect;* because it has been settled, that that provision was confined to the lands contained within the purchase lately made by the Commonwealth, of the Indians at Fort *M'Intosh*, of all the residue of waste lands within the charter bounds of *Pennsylvania*. This the counsel for the plaintiffs in error, have conceded. They have rested their case on the 3d sect. of the Act of 9th *April*, 1781, 1 *Sm. L.* 529, by which it is enacted, "that the surveyor general shall have power to appoint a deputy or deputies, in any county of this State, who shall have power to make and return into the land office, surveys of land, only in the county for which such deputy or deputies shall be appointed, for the conduct of which deputy or deputies, the said surveyor general shall be responsible." Under the Proprietary Government, the surveyor general exercised the power of making special deputations, and I do not think he was deprived of this power, by the Act of 1781. There might be instances in which it would be very useful to employ a special agent, and it could hardly be productive of any ill consequences, as his return would be subject to the judgment of the Board of Property. Indeed the principle involved in the first point, was decided in the case of *Wright's Lessse* v. *Wells*, 1 *Sm. L.* 201, where it was held, that a survey made on a warrant, dated 16th *March*, 1786, by *John Hoge*, deputy surveyor, *of land lying out of his district*, on which a patent issued the 7th *September*, 1786, was valid; and in *Shields's Lessee* v. *Buchanan*, and *Funston's Lessee* v. *M'Mahon*, mentioned in 2 *Sm. L.* 256, and in the

opinion of Judge YEATES in *Harris's Lessee* v. *Monk*, 2 *Serg. & Rawle*, 557, where surveys made by persons not the proper officers of the district, and recognised by the Board of Property, were determined to be valid. In the present instance it does not appear by what authority *James Harris* acted, but the acceptance of his survey, and patent granted on it, afford strong presumption of lawful authority. I am of opinion therefore, that the survey was not void. But I give no opinion on a survey made since the Act of 1785, in a part of the Commonwealth to which that Act extends.

On the second point I do not see how the opinion of the Court of Common Pleas, can be supported. The warrant was for 150 acres—the survey contained 328 acres, and a third person who had made an improvement prior to the survey, was interested. It may be presumed, that when that third person was making his improvement, he knew that there was vacant land adjoining, sufficient to give him 300 acres. He never could suppose, that his neighbour who had a warrant for 150 acres, would endeavour to include double that quantity in his survey, and if he were acquainted with the rules of the land office, he would know that such survey would not be permitted. Ever since the year 1767, the deputy surveyors have been forbidden to include more than ten per cent. surplus in their surveys. Yet they have often disregarded this prohibition, and where no third person was injured, it has been very common for the officers of the land office, to accept the survey, and issue a patent. It had been better if the rule had been more strictly observed; for many law suits have been the consequence of this imprudent relaxation. But although titles have been confirmed under these irregular surveys, where none but the proprietaries or the Commonwealth were interested, it has never been supposed that there should be a confirmation of surplus beyond ten per cent., to the prejudice of one who had acquired an inception of title before the making of the survey, either by improvement or any other legal method. That there should not be such confirmation, was declared for law in the case of *Kyle's Lessee* v. *White*, 2 *Sm. L.* 165. 1 *Binn.* 249, and *Steinmetz's Lessee* v. *Young*, 2 *Sm. L.* 166. Indeed the law has been carried so far in favour of third persons, that it has been decided, that not even the ten per cent. surplus should be in-

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cluded, to their prejudice. This will appear in the cases of *Elliott's Lessee* v. *Bonnet*, and *Gripe's Lessee* v. *Baird*, 2 *Sm. L.* 167. This is the general principle with respect to surplus; but there may be cases, where the conduct of the parties interested, either by agreement between themselves to designate their respective boundaries, or by long acquiescence, may make a difference. In the present instance, however, so far as we can judge from the evidence, there are no circumstances authorising a departure from the general rule. At all events, if there had been special circumstances, the Court should have given in charge, under what circumstances the law would have been in favour of the plaintiffs, leaving the facts to be decided by the jury. I am of opinion, that there was error in the decision of the Court, on the second point submitted to them, and therefore the judgment should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

DUNCAN J. gave no opinion, having been counsel in the cause.

SIMPSON *against* WRAY and KELLY.

Monday, October 15.

IN ERROR.

An order of the Board of Property and proceedings thereon, for a resurvey of a warrant, noting the interference with another survey, on which 755 acres were surveyed on a 420 acres warrant, is *prima facie* evidence against a surveyor claiming under the latter, though the order was made without notice to such party.

If the opinion of the Court be requested on a point by one party, and the Court in answer say, the adverse party has given a certain answer to it, which is also stated, it is error.

A survey of 750 acres, on a warrant for 420, ought to be inquired into by the Board of Property, and the bare acceptance of it, without patent, where the party had notice of an adverse claim, is not sufficient to vest title, to the injury of such claim.

Robert Wray and *Moses Kelly*, brought this action of ejectment in the Court of Common Pleas of *Huntingdon* county, and recovered 100 acres of land in that county, and

this writ of error was brought by *James Simpson*, the defendant below. As the paper title of *James Simpson* was the oldest, the case will be best understood, by stating that title in the first place, and then shewing in what manner it was encountered by the title of the plaintiffs below.

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The title of *Simpson* was as follows :—On the 14th *December*, 1793, *John Cadwalader* took out a warrant for 400 acres of land, on which a survey was made on the 5th *January*, 1794, and returned on the 10th *January*, 1795, as a survey containing 420 acres, although in fact it contained 750 acres. On the 12th *March*, 1807, *Cadwalader*, in consideration of 200*l.*, conveyed this tract of land to *Alexander Simpson*, *Robert Simpson*, jun., and *James Simpson*. Not long after this conveyance, possession was taken, which had been continued by clearing and improving part of the land, down to the time of bringing this ejectment.

The plaintiffs claimed under an improvement made by *Henry Day*, about the year 1801, or perhaps before, which was conveyed to *James Kelly* on the 12th *January*, 1803, who sold a moiety to *Robert Wray* on the 6th *January*, 1813. The possession under *Day's* improvement had been continued by him, or those claiming under him, without interruption. On the 15th *March*, 1815, a warrant was taken out by *Robert Wray* and *James Kelly*, the plaintiffs, for 400 acres of land founded on *Day's* improvement, on which a survey of 439 acres was made on the 9th *June*, 1815, including the 100 acres in dispute, which were also included in *Cadwalader's* survey. The plaintiffs contended, that when *Cadwalader's* survey was returned to the land office, the officers of the Commonwealth were imposed on by the assertion of the deputy surveyor in his return, that the survey contained only 420 acres, and that being afterwards informed of this, the Board of Property made an order on the 14th *March*, 1815, (the day of the date of the plaintiffs' warrant,) to resurvey *Cadwalader's* warrant, and make return to them of that resurvey, together with a survey on the plaintiffs' warrant, noting the interferences, and shewing the exact quantities in each. This evidence with the proceedings thereon, the plaintiffs offered to give in evidence, but the defendant objected to it,

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because the order was made without notice to *Cadwalader* or to himself. The Court admitted the evidence, and the defendant's counsel excepted to their opinion.

Evidence was afterwards given by the plaintiffs, to shew that the defendant had notice of the claim set up under *Day's* improvement, before any part of the 100 acres was cleared or improved. When the evidence was closed on both sides, the defendant's counsel proposed three points to the Court, on which they requested them to deliver an opinion to the jury. The third point was the following.

Although the survey under which the defendant claims contains more land than is stated in the return, yet the Commonwealth having received the return, and the defendant being a *bona fide* purchaser, and having made valuable improvements upon the land, it would be against equity in the Commonwealth to compel the defendant to throw off the surplus in any particular place, or do any thing more than compel him to pay for the surplus when the land should be patented, or at most, to throw it off at such parts as the defendant might elect.

Answer of the Court. To this the plaintiffs answer: whether the defendant is a *bona fide* purchaser without notice, and whether he has made valuable improvements, are questions for the jury. If the jury should believe some of the witnesses, *viz. William Grady*, the clearing was made after seeing the plaintiffs line. The law will be as the jury find the fact, with this exception, when double the quantity is returned which is stated in the return, the jury will judge whether the fraud is not so manifest as to affect any person on the ground with notice of a fraud.

The plaintiffs have also requested us to instruct you, &c.*

Tod, for the plaintiff in error, now contended, *first*, that the Board of Property had no right to issue an order for a resurvey of *Cadwalader's* land without notice to him: and *secondly*, that the Court below gave no opinion on the point proposed to them on behalf of the defendant. He further contended, that the answer was not correct, and cited 2 *Sm.*

* The President of the Court was absent.

L. 141, 142, *note*, 143. 164. 6 *Binn.* 102. 107. 114. 1 *Yeates*, 322. *Boar* v. *Moore's Administrators*, 1 *Serg. & Rawle*, 166.

Burnside, contra, insisted, that the Board of Property may at any time before the issuing of a patent, correct errors or relieve against frauds, and for that purpose may order resurveys. On the return of the resurvey, the party might appear, and would be heard. He cited 2 *Yeates*, 86. On the other point he contended, that the Court below after stating the point proposed by the defendant, having then stated the answer given by the plaintiffs' counsel, intended to adopt the answer, and it is to be considered as theirs. On the subject of the correctness of the answer, he cited *Acts of Assembly*, 8th *April*, 1785, *Purd. Dig.* 378. 3d *April*, 1792, *Purd. Dig.* 484. 13th *March*, 1817, *Purd. Dig.* 406.

The opinion of the Court was delivered by

TILGHMAN, C. J.—I think there can be no doubt that the evidence was properly admitted. Upon a suggestion of imposition by so great a quantity of surplus in *Cadwalader's* survey, it was not only the right, but the duty of the Board to have the matter inquired into. As to notice to the defendant, it would be sufficient, if he had an opportunity of appearing before the Board of Property, and making defence, on the return of the resurvey ordered by them. At all events the determination of the Board was not conclusive, but might be controverted in an action of ejectment. It has always been the practice of our Courts, to permit the proceedings of the Board of Property, even though irregular, to be given in evidence, and to instruct the jury as to the legal operation of them. There was no error therefore, in the admission of this evidence. If the surveys made in pursuance of the order of the Board of Property stand good, the plaintiffs will take 100 acres of the defendant's original survey, but the defendant will still hold 650 acres, under *Cadwalader's* warrant for 400 acres. The plaintiffs afterwards gave evidence, that the defendant had notice of the claim under *Day's* improvement, before he had cleared or improved any part of the 100 acres in dispute. After the evidence was closed on both sides, the defendant's counsel stated several questions on which they requested the opinion of the Court

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to be given to the jury. It is assigned for error, that those questions were not answered, and without doubt the third question was not, whatever may be said as to the others. The third question is stated by the Court, after which, they say, that *the plaintiffs' counsel* have given a certain answer to it, which is also stated; but the Court gave no opinion of their own. It is now said, that the Court intended to adopt the answer given by the plaintiffs' counsel. It may be so, but it does not appear so by the record, and therefore we cannot say that the question was answered by the Court. It is with regret, that for a slip of this kind, we are obliged to reverse a judgment, the merits of which, so far as we can judge from the evidence, were strongly with the plaintiffs. It is very clear, that a survey containing on its face 420 acres, but in fact 750, ought to be inquired into. The bare acceptance of it in the surveyor general's office, without patent, could not be obligatory in a case like the present, where the person claiming under it, had notice before he had gone to any expense in improvements, of an adverse claim, which although it might take part, would yet leave more than appeared on the face of the draft, to be contained in the survey. These remarks are confined to the case before the Court, and by no means intended as an intimation of any opinion that the Board of Property possess a general power to cut off the surplus in ancient surveys which have not been patented.

I am therefore of opinion, that the judgment should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

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BLYTHE *against* M'CLINTIC and another.

Monday, October 15.

IN ERROR.

ERROR to the Court of Common Pleas of *Franklin* county, in an ejectment brought by *Samuel Blythe* against *John M'Clintic* and *Matthew Duncan*, in which there was a verdict and judgment for the defendants in the Court below.

The case was argued by *Clarke* and *Brown*, for the plaintiff in error, and *J. Riddle* and *Chambers*, for the defendants in error.

The opinion of the Court was delivered by

TILGHMAN, C. J.—This is an ejectment for a tract of land in *Franklin* county. Evidence was given of title in *Samuel Nicholson*, who on the 28th *December*, 1793, conveyed to *John Nicholson*, who mortgaged to *Joseph Ball*, by deed dated 20th *October*, 1794. On the 31st *March*, 1801, two distinct articles of agreement were executed, between *Joseph Ball* and *Samuel Nicholson*. By one of these articles, after a recital "that the late *John Nicholson*, then deceased, had mortgaged to *Joseph Ball*, three tracts of land, (of which that in dispute is part,) which were advertised by the Sheriff of *Franklin* county for sale on the 9th *April* next ensuing, and that *Samuel Nicholson* was desirous to become the purchaser thereof," it was agreed that the said *Joseph Ball* should purchase the said three tracts, containing together, about 460 acres, at the Sheriff's sale, provided the same should not go higher than 14,000 dollars, and convey them to the said *Samuel Nicholson*, for the sum of 14,000 dollars, to be paid in manner following, *viz.* one-third on or before the 9th *April*, 1802, with lawful interest thereon from 9th

A. holding a mortgage of C.'s land, agreed with B. that he would purchase the land at Sheriff's sale for B. at a certain price, to be paid him by B., and by another agreement that certain property held by B., together with the mortgaged premises, should be applied to paying a debt due by C. to A., and if there was sufficient to do so, then the obligation of B. to pay for the premises to be purchased by A. should be void. A. purchased the lands at Sheriff's sale: no deed was made to B., nor any application of the proceeds of property to pay A.'s debt, and the agreements between the parties were mutually cancelled and releases given; after which B. conveyed to D., a friend of B, and a person in necessitous circumstances; *held*, in an ejectment by D. against persons claiming under A., that evidence is not admissible to shew that A. recovered his debt by proceedings against the property of C.

Where judgment has been obtained in a *scire facias* on a mortgage, evidence is not admissible afterwards in an ejectment to shew payment of the mortgage debt prior to the judgment.

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April, 1801, and the remaining two-thirds in six equal annual payments, the first whereof to be made on the 9th *April*, 1803, and so on yearly on the 9th *April*, until the whole should be paid, with lawful interest on each payment, from the 9th *April*, 1801. By the other article, after a recital "that *John Nicholson* was in his life-time indebted to *Joseph Ball* in the sum of 51,000 dollars or thereabouts, for which the said *Ball* had obtained judgments, which bound his property in the counties of *Franklin* and *Dauphin* in *Pennsylvania*, to satisfy which, sundry lots of ground in the city of *Washington* were conveyed by the said *John Nicholson* to the said *Ball*, and that part of the said property in *Franklin* county was claimed by the said *Samuel Nicholson*, by virtue of an agreement between him and the said *John Nicholson*, and that the said *Ball* had agreed to sell to the said *Samuel Nicholson* the property so claimed, for the sum of 14,000 dollars, and that the said *John Nicholson* had conveyed to the said *Samuel Nicholson*, sundry debts and property of various kinds, to secure and indemnify him against any sums which he should be obliged to pay for the purchase of the premises;" it was agreed between the said *Samuel Nicholson* and the said *Ball*, that all the property bound by the said mortgage or judgment, and all the debts and property assigned to the said *Samuel Nicholson* by the said *John Nicholson* should be applied to the payment of the debt due to the said *Ball*, and in case there should be a sufficient sum arising therefrom to satisfy the same, then the obligations which the said *Samuel Nicholson* should give to the said *Ball* to the amount of 14000 dollars, for the purchase of the said 460 acres of land, should be delivered up to the said *Samuel Nicholson* and cancelled. *Joseph Ball*, after the making of these agreements, had the mortgaged lands in *Franklin* county sold by virtue of a *levari facias*, on a judgment obtained on his mortgage in *October*, 1802, and became the purchaser himself, for the sum of 4,000 dollars, and received a deed of conveyance from *John Brotherton* the Sheriff, on the 8th *January*, 1803. There was no evidence of any payment made by *Samuel Nicholson* to *Ball*, in pursuance of their agreement. But it appeared by several letters of *Samuel Nicholson* to *Ball*, dated the 17th *February*, 1st *March*, 20th *April*, and 25th *April*, 1805, that *Nicholson*

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despaired of being able to make payment, and offered to cancel the agreements of the 31st *March*, 1801. This offer was accepted by *Ball*, and on the 25th *April*, 1805, (the day of the date of the last letter,) an indenture was executed, by which the parties mutually released each other from both the said agreements, and declared that the same should be considered as in all respects null and void. On the 1st *March*, 1806, *Samuel Nicholson* executed a conveyance to *Samuel Blythe*, the plaintiff, of 500 acres of land in *Franklin* county, comprehending the land in dispute, in consideration of 16,000 dollars, paid or secured to be paid to him, with warranty against the said *Samuel Nicholson* and his heirs, and all persons lawfully claiming or to claim under him or them. About the time of this conveyance, and for some time before it, a great intimacy subsisted between *Blythe* and *Nicholson*; and *Blythe* was in necessitous circumstances. This is a summary of the evidence given on the trial in the Court below, after which the plaintiff's counsel offered to give in evidence, a number of mortgages from *John Nicholson* to *Joseph Ball*, for lands in different counties in *Pensylvania*, and proceedings on some of those mortgages, with a view of shewing that *Ball* had received as much as would pay his whole debt of 51,000 dollars. He also offered in evidence, several deeds to *Samuel Blythe* for land in *Delaware* county, *Pennsylvania*, dated in the year 1805, and deeds for the same land from *Blythe* to *Samuel Nicholson*, in the year 1807. All this evidence was rejected by the Court, whereupon the counsel for the plaintiff excepted to their opinion.

When *Samuel Blythe*, the plaintiff, received a conveyance of the land in dispute, from *Samuel Nicholson*, the legal title was in *Joseph Ball*, of which the plaintiff was bound to take notice, because *Ball* had purchased at the Sheriff's sale, and received a deed from the Sheriff, which was on record. The plaintiff, who claimed under *Samuel Nicholson*, stood in his place, and had only such an equitable interest as *Nicholson* could convey to him. But what was that? A few months before *Samuel Nicholson* conveyed to the plaintiff, he had come to a full understanding with *Ball*, and mutual releases had passed between them. Now, when those releases were executed, it was well known to *Nicholson*, that *Ball* had been a purchaser at Sheriff's sale, and received a deed from the

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Sheriff, by which any interest which he might once have had in the mortgaged premises by virtue of a deed from his brother *John Nicholson*, in the year 1795, was extinguished; and when *Ball* released him from his obligation to pay 14,000 dollars, and he released *Ball* from the agreement to apply the proceeds of sundry other securities, towards the discharge of the debt of 51,000 due from *John Nicholson* to *Ball*, of which the debt due by this mortgage formed a part, I think it must have been the intent of both parties, that *Ball* was to retain the mortgaged premises, purchased at Sheriff's sale, discharged from all equity or claim of *Nicholson*. Then if *Nicholson* could make no further claim, neither could the plaintiff who comes in under him. Indeed, it appears very extraordinary, and very suspicious, that after what had passed between *Ball* and *Nicholson*, the latter should undertake to make a conveyance to *Blythe*, who was then distressed for money, and being employed as his agent, (as appears by the letters from *Nicholson* to *Ball*,) must probably have been acquainted with the settlement and releases which had taken place. But there is another, and a decisive reason, why the evidence offered by the plaintiff should not have been admitted. A *scire facias* on *Ball's* mortgage had issued to *August* Term, 1802, against the widow and heirs of *John Nicholson*, deceased, and *Samuel Nicholson and others terre tenants*. To this writ the Sheriff returned, *that he had made known*, &c., and judgment was entered in *October*, 1802. Now this evidence offered by the plaintiff went to prove payment *prior to that judgment*. That certainly was inadmissible. If any payment had been made, *Nicholson* might have pleaded to the *scire facias*. That was his time, and having suffered judgment to pass against him, neither he, nor those claiming under him can be let in to plead payment afterwards. The counsel for the paintiff, did indeed contend, that *Samuel Nicholson* suffered judgment to go on the mortgage, because he had agreed to purchase of *Ball*, and the agreement being afterwards cancelled, he should be permitted to open the judgment and plead payment, or what is the same thing, give evidence of payment in this ejectment. But I am of a very different opinion. By the cancelling of the agreements between *Nicholson* and *Ball*, *Nicholson* was discharged from the payment of 14,000 dollars which he had bound himself

to pay, and not the least intimation appearing in the indentures of release, of any intention to permit him to set up a plea of payment, which might affect the title of the land purchased by *Ball* of the Sheriff, I can see no pretence in law or equity, for admitting evidence of payment, either by *Nicholson*, or the plaintiff who stands in his place. I am therefore of opinion, that the evidence was properly rejected by the Court below, and the judgment should be affirmed.

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Judgment affirmed.

BRINDLE and another *against* M'ILVAINE.

IN ERROR.

Monday, October 15.

ERROR to the Court of Common Pleas of *Franklin* county.

A. conveyed to B., 25 acres of land, part of a large tract, in consideration of 325 pounds, and, at the same time, B. gave A. a bond for the payment thereof next day, and also permitting A. to sell the 25 acres if he sold the residue; A. agreeing to allow B. the advance of price on the same, for which he might sell the whole. A. retained possession, and afterwards entered into articles of agreement with C. to sell the whole, in consideration of money and land, and eventually gave C. a deed for the whole. B.'s deed was not recorded till after the agreement, but C. then had notice of it. *Held*, that B. had no right to sell on the terms that part of the consideration money should be paid in land: but that B. could not recover the 25 acres from C., until B. tendered all the purchase money due on the bond.

This was an ejectment for 25 acres of land in *Franklin* county, brought against *George Brindle* and *John Brotherton* by *Elizabeth M'Ilvaine*, the plaintiff below, who having died after the commencement of the action, her heir and devisee, *Alexander M'Ilvaine*, was substituted in her place, according to the Act of Assembly in such case provided. Both plaintiff and defendants claimed under *Robert Haslet*, who was seised in fee of a large tract of land of which the 25 acres in dispute were part. On the 24th *March*, 1808, *Robert Haslet*, who married the daughter of *Elizabeth M'Ilvaine*, executed a deed by which he conveyed to the said *Elizabeth*, the 25 acres in question in fee, in consideration of 325*l.* to be paid by her; and on the same day she gave him her bond in the penalty of 2,000 dollars, with the following conditions, *viz.* that the said *Elizabeth* should pay

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to the said *Haslet* the sum of 325*l.* on the day next following the date of the said bond, and also, "that she should well and truly allow and permit the said *Robert Haslet* to *sell and convey* a certain piece of land, containing 25 acres, which is this day conveyed to her by the said *Robert*, for which the said above sum is the consideration, provided the said *Robert* shall think proper to sell the residue of the said tract of land, *and he the said Robert agreeing to allow the said Elizabeth the advance of price on the said piece of land, for which he may sell the land.*" The deed to *E. M'Ilvaine*, was not recorded until the 1st *October*, 1810. The possession was not delivered to her, but retained by *Haslet*, who on the 21st *October*, 1808, entered into articles of agreement with *John Brotherton*, one of the defendants, for the sale of the whole tract, containing about 178 acres, and including the 25 acres, for the sum of 4,800 dollars, in money, and 100 acres of other land, to be conveyed to *Haslet* by *Brotherton*. At the time when this agreement was made, *Brotherton* was put in possession of the bond from *E. M'Ilvaine* to *Haslet*. On the 31st *March*, 1817, *Haslet* executed a deed of conveyance to *Brotherton*, in pursuance of the articles of agreement. This deed was in *Haslet's* own name, without taking any notice of the power derived from *E. M'Ilvaine*. *George Brindle*, the other defendant, claimed under *Brotherton*. Whether Mrs. *M'Ilvaine* had paid any part of her bond or how much, were facts on which some evidence was given, but the parties differed with respect to them, and they were submitted to the jury. But there were two points of law on which the Court below delivered an opinion, to which the counsel for the defendants excepted.

The first point was, on the validity of the deed from *Haslet* to *Brotherton*. The Court were of opinion, that being made in *Haslet's* own name it had no effect as to the 25 acres, the legal estate in which was in *Elizabeth M'Ilvaine*.

And in the second place, it was given in charge to the jury, that the plaintiff was entitled to recover in this ejectment, without tender or payment of the balance of the purchase money due from Mrs. *M'Ilvaine* on her bond, supposing any part to remain unpaid.

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S. Riddle and *Brown*, for the plaintiffs in error.

1. The Court charged the jury erroneously in stating that the power to sell was not properly executed. We contend that it was even good at law. *Parker* v. *Kett*, 1 *Ld. Ray.* 659. *Sir Edward Clere's Case*, 6 *Co.* 17. 1 *Bac. Ab. Authority C.* But granting that the power was not legally executed, yet chancery will in such case compel the principal to convey.

2. The bond bearing the same date as the deed, is in the nature of a defeasance of the deed. Neither *E. M'Ilvaine*, nor her devisee, can recover without paying the purchase money due by her. *Brotherton* had paid for the whole tract, and was entitled to all money due from *E. M'Ilvaine*, and the Court ought to have directed the jury that it should have been tendered or paid before she or her devisee could recover. She was a vendee, and the vendor had a lien for the purchase money. *Irvine* v. *Campbell*, 6 *Binn.* 118. 1 *Vern.* 267. 2 *P. Wms.* 294.

A. Chambers and *G. Chambers*, contra.

1. There was no power, but only an agreement to give a power. If this agreement which was contained in the condition of the bond were broken, *Haslet* had his remedy on the penalty. Mrs. *M'Ilvaine* did not mean to give *Haslet* power to receive the purchase money. But if there was a power, it was coupled with an interest, and the legal estate remained in Mrs. *M'Ilvaine*. Such power should have been set forth and strictly pursued. *Co. Lit.* 236. *a.* 5 *Johns. Rep.* 58. The conveyance by an attorney must be in the name of the principal. *Comb's Case*, 9 *Co.* 76. *Franklin* v. *Small*, 2 *Ld. Ray.* 1418. 1 *Bac. Ab.* (*Wilson's Ed.*) *tit. Authority.* 7 *Mass. Rep.* 14. 2 *Caine's Rep.* 66. *Peters* v. *Condron*, 2 *Serg. & Rawle*, 80. The deed of *Haslet* to *Brotherton* was simply in his own name, and moreover, it was in part a sale for land, the consequence of which was, that it could not be known whether he sold for an advanced price or what the advance was.

2. *E. M'Ilvaine* had a right to enter immediately on receiving the deed: consequently she was entitled to possession without paying the purchase money. On this point they cited *Sugden on Vendors*, 371. 374. 384. *Galbraith* v. *Fenton*, 3 *Serg & Rawle*, 359.

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The opinion of the Court was delivered by

TILGHMAN, C. J.—As the defendants stand on an equitable defence, it is not very material whether the deed from *Haslet*, conveyed the estate of *Elizabeth M'Ilvaine* or not. If there were no other objection than the form of conveyance, neither Mrs. *M'Ilvaine*, nor the defendant who claims as her devisee, would be permitted to take advantage of that defect. But there is a more substantial objection, which will appear by considering the nature of the contract between *Haslet* and his mother-in-law, Mrs. *M'Ilvaine*. *Haslet's* deed to her, and her bond to *Haslet*, bear the same date, and must be considered as one transaction. Although *Haslet* conveyed 25 acres, part of his larger tract, yet it was understood, that he was to have power to sell the whole tract, including the 25 acres, provided that Mrs. *M'Ilvaine* was to have the benefit of the advance in price, if any there should be. This power Mrs. *M'Ilvaine* could not revoke, because it was in part the consideration of *Haslet's* conveyance to her, and the reason of his reserving the power is plain. It might have prejudiced the sale of the whole tract, if these 25 acres were cut out of it. On the other hand the interest of Mrs *M'Ilvaine* was attended to. For while care was taken that the whole tract should be sold to the best advantage, she was to be the gainer by any advance of price which *Haslet* might obtain. *Haslet* therefore had no right to sell in such a manner as would make it impossible to know what the advance of price was, which he has done, by taking part of the price in land. And although Mrs. *M'Ilvaine's* deed was not on record, when *Brotherton* made his agreement, yet it appears that he was fully acquainted with it, because he was put in possession of her bond which recites it. But if Mrs. *M'Ilvaine's* devisee insists on vacating the sale of these 25 acres, he ought not to be permitted to take the possession from *Brotherton*, till he pays the purchase money. Considering all the circumstances of the contract, and the retaining of the possession by *Haslet*, it seems to have been the intent of the parties that *Haslet* should keep the security for payment in his own hands. If he sold at an advanced price, all that he had to do, was to pay the advance to Mrs. *M'Ilvaine*, and keep the residue for himself. If he sold at exactly the same rate that she paid, he might keep the

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whole, and in that case she would have nothing to pay. But the power in *Haslet* to sell, though irrevocable by Mrs. *M'Ilvaine*, was not to be abused by protracting the sale for an unreasonable length of time. In such case, on tender of the purchase money and interest, she should have been entitled to recover the possession. This construction of the contract, gives perfect equity to both parties, and seems really to be what both intended. I am therefore of opinion, that there was error in that part of the charge of the President of the Court of Common Pleas, in which it was said, that the plaintiff was entitled to recover without payment or tender of the purchase money. It follows that the judgment is to be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

CLARK *against* WORLEY.

IN ERROR.

Monday, October 22.

ERROR to the Court of Common Pleas of *Cumberland* county.

The surety of a constable is liable for his breach of duty in not paying over money collected on a warrant placed in his hands, commanding him to levy on a constable of an adjoining township, under the 12th sect. of the Act of 20th March, 1810.

A case was stated in the Court below, and agreed to be considered in the nature of a special verdict, in a suit brought there by appeal from a magistrate, in which *Joseph Worley*, the defendant in error, was plaintiff, and *William Clark* was defendant.

James Hildebrand was appointed to the office of constable of *Allen* township, *Cumberland* county, in the spring of the year 1820, and on the 3d *April*, 1820, *William Clark* became bound as his security in an obligation to the Commonwealth for the just and faithful discharge of his said office. This obligation agreeably to the 29th sect. of the Act of Assembly of the 20th *March*, 1810, *Purd. Dig.* 89, was declared to be "held in trust for the use and benefit of all persons who

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might sustain injury from him in his official capacity by reason of his neglect of duty." This suit was brought by *Worley* against *Clark*, as security for *Hildebrand*, founded on the following facts.

Worley had recovered a judgment against *Samuel Coover*, then constable of *East Pennsboro* township, agreeably to the 12th sect. of the Act of 20th *March*, 1810, *Purd Dig.* 359, for 55 dollars and 15 cents, and on the 7th *September*, 1820, after *Coover* had ceased to be a constable, an execution on the said judgment was delivered to *Hildebrand*, as constable of *Allen* township, which adjoins *East Pennsboro* township. When the execution was delivered, there were two constables, legally qualified, and acting for *East Pennsboro* township. *Hildebrand* received part of the money, but paid none over to *Worley*, who afterwards brought suit against *Hildebrand*, and on the 11th *October*, 1820, recovered judgment against him, under the 12th sect. of the Act of 20th *March*, 1810, by confession, for the sum of 57 dollars 68 cents. Execution was issued on this judgment, but returned *nulla bona* and *non est inventus*.

The Court below gave judgment for the plaintiff.

Ramsey, for the plaintiff in error, now contended, that *Clark* as security for *Hildebrand*, was not liable for his acts done out of the township of *Allen*. The 12th sect. of the Act of 20th *March*, 1810, under which the proceedings took place, requires the justice to issue "a summons directed for service to a constable, or to some other fit person who shall consent to serve the same, and having so consented by accepting of such process, shall be bound to execute the same, under a penalty of 20 dollars, &c., but should not a constable or other fit person conveniently be found to serve the process as aforesaid, the justice shall direct it to the supervisor of the highways of the township, ward or district where such constable resides, whose duty it shall be to serve the same." This obviously contemplates that the process against a constable must be served by another constable or fit person, or supervisor of the township in which the defendant resides, and does not sanction its service by the

constable of another township. There were two constables for *East Pennsboro* township, in which *Coover* resided, and the process ought to have been directed to one of them. In support of this construction of the Act, the 11th sect. requires the constable who levies on goods, to advertise them "*in his township, ward or district.*"

Hamilton, contra, contended, that the judgment being rendered against *Coover* while constable, the execution might be directed to the constable of another township, and that in general the constable of one township may serve process in another. The words of the 12th sect. do not restrict the service to the constable of the township in which the defendant resides, nor does the spirit of the Act, or any reason require it. Besides *Hildebrand* has confessed judgment, and his security is precluded from saying that he was not liable as constable.

The opinion of the Court was delivered by

DUNCAN J.—The plaintiff in error contends, that the obligation which he entered into, as the security of *James Hildebrand*, the constable of *Allen* township, which was "in trust for the use and benefit of all persons who might sustain an injury from him in his official capacity, by reason of his neglect of duty," did not extend to the execution; inasmuch as he was not bound to execute this process against the constable of *East Pennsboro*.

The duties of constable, so far as respects the execution of civil process, depend on the Acts of Assembly giving jurisdiction to justices of the peace. These Acts are consolidated in the Act of 20th *March*, 1810. So far as respects the jurisdiction of the justice, it is admitted that it is not limited to the township or district for which he may have been commissioned, but is co-extensive with the county. An attempt to restrain it has proved abortive. Whether the alleged inconveniences from the general exercise of the power to issue process throughout the county, would or would not be counterbalanced by the mischiefs that would flow from circumscribing the authority within narrower bounds, the township or district for which they are commissioned, is for Legislative consideration and enactment.

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The justices, by the 2d sect. of that Act, are empowered to issue their summons or warrant of arrest, directed to the constable of the ward, township or district, where the defendant usually resides, *or to the next constable most convenient to the defendant;* and by the 6th and 9th sections of the same Act, after the expiration of the stay of execution, on any judgment, the justice is required to direct the execution to the constable of the ward or district where the defendant resides, or to the next constable most convenient to the defendant. *Allen* and *East Pennsboro* are adjoining townships; so that the justice here has complied with the exact letter of the law. Where the justice proceeds for a crime, he may direct his warrant to any person by name, but where he acts on the civil side, he has no more authority to direct his process to a private individual, than the Court of Common Pleas have to direct their process to any other than the Sheriff. The Sheriff is the officer of the Court; the constables are the officers of the justices, so far as they are authorised by law to command them. The decisions in *England*, to which we have been referred, have no relation to civil process. When they speak of warrants directed to constables, they are for offences. The law may be the same here on such warrants, and in such cases it well may be that on a warrant generally directed to all constables, none can execute it out of his own *precinct*; but if directed by name to a particular constable, he may execute it any where, within the justice's jurisdiction. 2 *Hawk.* 86. 1 *H. H. P. C.* 581. 2 *H. H. P. C.* 110. *Foster's Crown Law*, 312. Though I am not to be understood as giving any opinion how that stands; it it is unnecessary to decide it. As the jurisdiction in this case is unknown to the common law, regulated by Acts of Assembly, and where the Legislature have required the justice to issue the process to the constable of the township in which the defendant resides, or the next constable most convenient to him, I cannot but consider the process, if directed to the one or the other, as authorised by law, and that the constable to whom it is directed is bound to execute it. Nor would I restrain this rigidly to the very next constable; or that the justice is exactly to measure the distance from the next constable to the defendant's residence. For where a statute required an affidavit to be made before a justice within the

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hundred or near to the same, this is only directory, and an affidavit taken before one, not the next justice is sufficient. *Bull's N. P.* 186. A penal statute requiring a notice to be given in a market town near the place, does not confine it to the next market town, but gives some latitude, yet not so as to embrace remote places. *Foster's Crown Law*, 58. *Next* in a criminal proceeding would be more restrictive; yet in a civil one, it could not be restricted in all cases to the very next, because it would render the execution of the act difficult, and subject to great niceties; but here it was directed to the very next constable to the defendant's place of residence, and that such direction is good, is all that is now decided. Nor is there any difference, where the process is issued against a constable for official misconduct. The 12th sect. of the Act provides, "that the justice shall issue a summons directed for service to a constable or some other fit person, who shall consent to serve the same, and having so consented by acceptance of the process, shall be bound to execute it, under a penalty of twenty dollars; but should not a constable or other fit person be found, the justice shall direct it to the supervisor of the high way, of the township where such constable resides, who shall serve it under the like penalty for refusal." This section proves, *first*, that it required special authority to enable the justice to ssue to any *other than a constable; next, that it may be directed to any constable*—a constable, not confined to township; and then, that when the Legislature intends to confine the execution of process by an officer, they do so in express terms; as here to a supervisor; it is to be the supervisor of the highway of the township where the defendant resides, but where to a constable it is without restriction. Under the Act of 21st *March*, 1772, for rendering justices of the peace more safe in the execution of their office, and indemnifying constables and others acting in obedience to their warrants, it cannot be denied, but that protection would have been afforded to *Hildebrand* in the execution of this process. Though obligations of securities for officers are not to be extended, yet they are to receive a reasonable construction, or it is useless to take them. The sum in which they are bound for constables is very inadequate. Beyond that they are not liable. They know or ought to know what has been the practice. It is universal practice,

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not confined to one justice, or one county, but pervading the State, for justices to issue warrants and executions to other than constables residing in the same township with the defendant. This usage would have some weight were the case a doubtful one. But it does not require the aid of any usage to support the opinion of the Court of Common Pleas. For I think that the plaintiff below established a breach of the official duty of the constable; he sustained an injury for his neglect of duty in his official capacity, according to the very tenor of the obligation; that the justice had authority to issue this process against the constable of *East Pennsboro* to the constable of *Allen*, by his name of office; that the constable of *Allen* in his character, name, and capacity of constable, was bound to execute it, and that for this official misconduct and neglect of duty, his security is answerable. My opinion is, that the judgment be affirmed.

Judgment affirmed.

REED *against* GARVINS's executors.

Monday, October 22.

IN ERROR.

In an action against executors on a joint bond given by the testator and another, the defendants pleaded a former recovery: *held*, that an award made by arbitrators in a former suit on the bond against both obligors, in which an appeal was entered, but the defendant's testator died during the pendency of the appeal, and the other defendant disavowed the appeal, supported the plea.

In such joint suit, where one obligor dies after the appeal, a *scire facias* may issue against his executors to compel them to become parties.

The real estate of the testator is not discharged from the debt: whether his personal estate is discharged, *query*.

ERROR to the Court of Common Pleas of *Adams* county.

This action was brought by the plaintiff, *Thomas C. Reed*, on a bond in which *William Garvin*, deceased, was bound jointly with *Philip Stentz*, who was still living. The defendants pleaded in bar that judgment had been obtained on the bond against both obligors in the life time of *William Garvin*, which judgment was in full force, &c. The plaintiff replied

nul tiel record, and on this the parties were at issue in the Court below. It appeared by the record produced by the defendants in support of their plea, that a suit had been brought against both obligors, which was submitted to arbitrators under the compulsory Act, and an award made in favour of the plaintiff and filed in the office of the prothonotary according to law. An appeal was entered within twenty days, and security given. *William Garvin* died pending the appeal, and the other obligor *Stentz*, disavowed the appeal by an entry on the docket signed by him.

Dobbins and *Chambers*, for the plaintiff in error.

Cassatt, contra.

TILGHMAN C. J.—It is evident, that this record made good the defendants' plea. For by the Act of Assembly, the report of the arbitrators had the effect of a judgment, until reversed. Indeed, as to one of the obligors, against whom the report operated as a judgment, there was not in fact any appeal, because he came into Court and disavowed it. When an obligee has brought a joint action and proceeded to judgment, he never can have another action on the bond, because it is merged in the judgment. I am of opinion therefore, that the judgment of the Court of Common Pleas should be affirmed. Here I might stop; but as the counsel for the plaintiff in error, is desirous to have the sentiments of the Court, as to the mode to be pursued, in order to come at the estate of *William Garvin*, I shall not withhold my opinion on that subject. The Arbitration Act has introduced a new system, and in order to carry it into effect, some alterations of the common law are necessary. The report of the arbitrators has the effect of a judgment, until reversed on an appeal. It is a new species of judgment, in some respects *final*, but not in all. If no appeal be entered within twenty days, it is completely final. Execution may be issued on it, or a writ of error brought. But an appeal being entered, the appellant is entitled to a trial by jury, and judgment will be entered according to the verdict, as usual. The case before us, is singular. One of the appellants dies before trial, and the other, who is said to be insolvent, disa-

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vows the appeal. How then is the plaintiff to proceed? No doubt the executors of the deceased appellant might come into Court, and substitute themselves in his place, but they do not choose to do it. I am of opinion then, that the plaintiff may issue a *scire facias* to call them in. But to this it is objected, that they ought not to be brought in, because their testator being dead, the judgment survives against the surviving obligor, and the estate of the testator is discharged. I give no opinion as to the personal assets, but the real estate, if any, is not discharged. In the note to *Sergeant William's Ed. of Saunders Reports*, 51, *a*, the law is accurately laid down, and cases cited to support it. *A personal execution survives, but a real one does not.* But, it may be said, supposing the law to be so, why not proceed against the heir or terre tenant? I answer, that the proceeding against the executor is more analogous to the law and practice of the Commonwealth. The land of the testator is subject to the payment *of all his debts*, and is supposed in law to be assets in the hands of the executor for the purpose of paying debts. On a judgment against the executor, the land may be levied on in the hands of the heir, or devisee, or any person who has purchased it, after the death of the testator. Supposing then the executor of the deceased person to be brought in on a *scire facias*, and to proceed to a trial on the merits of the cause on the appeal, judgment would be entered on the verdict, and I do not think it necessary to trace the matter further at present. It is impossible to anticipate all the difficulties which may arise in forming a practical system under our Act of Assembly, and it would be dangerous to attempt to obviate them before they occur. In general however, I may say, that there was no intention to alter, by that Act, the general principles of the law as to the liability of the real or personal estates of two defendants against whom a joint judgment is entered. Consequently the Courts will take care that those principles shall not be violated. I have forborne from entering into a consideration of those cases in which the estate of a joint obligor who is dead, may be affected by suit against his executor, the surviving obligor being insolvent. From necessity, our Courts of law give relief in such cases as would be relievable in equity, as appears by the case of *Lang and others* v. *Keppele's executors*,

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1 *Binn.* 123, where an action for a partnership debt, was sustained against the executors of the deceased partner, in the life-time of the survivor, who was a certificated bankrupt. In case of a judgment against two joint partners, the law would be the same. Although by the death of one, after judgment, the execution, at law, would survive, yet in case of the insolvency of the survivor, recourse might be had to the estate of him who was dead. What were the circumstances of the present case, does not appear. We see nothing but a judgment on a joint bond, and therefore it cannot be said that any principles of equity are applicable.

GIBSON J.—As difficulties are sometimes felt, respecting the course to be pursued, where one of two or more joint defendants, has died after an appeal from arbitrators, it is necessary to point out what I conceive to be the proper one; and were it not that my confidence in the opinion I am going to deliver, is some what lessened by its being in opposition to that of my brethren, I should deem that course a plain and obvious one. By the common law, where one of two who are jointly liable, dies before suit is brought, you can sue only the survivor: where, after suit brought, you can obtain judgment only against the survivor: and where after judgment, you can have execution only against the survivor. Thus, the principle, that the executor of a joint obligor, or a joint defendant first dying at any time before execution, is discharged, is of universal application to proceedings according to the course of the common law. What is to hinder its application to proceedings on an appeal from the judgment of arbitrators, which are also according to the course of the common law? The prevailing principle of that part of the Arbitration Act, which relates to the subject under consideration, is, that after the appeal is taken, the report remains a judgment, although a judgment suspended. If the defendant fails to abate it, according to the condition of his recognisance, the judgment on the verdict does not take the place of, but revives, and brings into active operation, the old judgment of the arbitrators, whose incidents of lien and accruing interest, attach from the filing of the report. Where, however, it is abated in part, the verdict and judgment on the appeal, only *revive* the old judgment for the resi-

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due, inc merely ascertain the sum due on it. Where, however a greater sum is found against the appellant, than was reported by the arbitrators, the old judgment is not merged although it is included in the new, and one execution issues for all. In all cases of appeal, therefore, joint defendant present one of two aspects: that of defendants against whom judgment has already been rendered; or of defendants against whom judgment may be rendered hereafter: in either of which, the law is clear, that if one dies, his executor is discharged. From the judgment of the arbitrators, he is discharged, just as in any other case of a joint defendant dying between judgment and execution, whether the execution has been suspended by order of the Court, the intervention of the law, or the laches of the plaintiff: from liability to a future judgment he is discharged, just as in the case of any other joint obligor who dies before judgment. Wherefore, then bring in the executor by a *scire facias?* Not that he may discharge the personal assets (with which only he has any concern) from the judgment of the arbitrators; for they are discharged already: not that he may be made a party along with the surviving defendant, and as such be liable to an increase of recovery in Court; for that would be against the plainest principles of the common law. The truth is, the suit should go against the survivor just as if it had never been before arbitrators at all. I should think this clear beyond dispute where *both* defendants have appealed. But then one may appeal for himself. True: but then the suit is removed as to the other also, who at least *pro forma*, is a party on the record. Such would seem to have been the opinion of Mr. Justice YEATES in *Gallagher* v. *Jackson*, 1 *Serg & Rawle*, 492; although it was conceded, that the judgment against him who did not join remained before the justice. The Court will take care that he pay no costs, and that he be not, in any other way implicated in the consequence of the appeal; but on the other hand he will be restrained from doing any thing to frustrate the right of the person substantially concerned: as was held in the case just cited. The same principle is familiar in cases of equitable assignment; where the assignee is treated as the real party, and uses the name of the assignor subject to no controul of the later. But supposing the surviving defendant might

withdraw his name and defeat the appeal: he would set up the judgment of the arbitrators, which is a judgment binding exclusively on himself, but on which no execution could issue while the cause remained in Court. There is, in truth, but one reason why he should not be permitted to do so; which is, that the *heir* of the deceased defendant, or the terre tenant of his *land*, has an interest in the matter. The executor has none; for by the death of his testator, the personal estate is discharged: even the recognisance to prosecute the appeal with effect is released, and all personal responsibility in the action pending is at an end. Those interested in the real estate, however, should have an opportunity to get rid of the lien created by the judgment of the arbitrators; and should therefore have a day in Court. But why issue a *scire facias* to a person who has nothing to do with the land? It is not absolutely necessary to make him a party; for there is a party on the record already, and the only one that can legally be so. This very material circumstance is wanting in ordinary cases of *scire facias* to revive a judgment against the land of a deceased party. There, you are obliged to issue the writ against the executor, because by our laws, lands are assets for the payment of debts, and, by our practice, affected only incidentally through the medium of a judgment in a personal action: and as the inquiry touching the defence of the terre tenant is only collateral, you must have a legal party against whom there may be a judgment. So far is this carried, that the land may be sold on a judgment against the executor *without even notice to the heir or terre tenant*, the only persons who can have an interest in protecting it; and this doctrine so little creditable to the jurisprudence of *Pennsylvania*, is now too firmly rooted, to be eradicated without extensively impairing the security of titles. But why adopt it in a new case, where necessity compels us to exercise a latitude of discretion in providing means to give full effect to the intention of the Legislature. We are not compelled to pursue analogies so little consistent with justice. Here we are not under the necessity of having recourse to the executor to obtain a party: for there is a party already on the record, with whom the plaintiff may bring the matter to a close, and he therefore suffers nothing by the executors not coming in. If the heir, or the terre tenant,

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will not avail himself of an opportunity to defend under the name of the survivor, so much the worse for himself: it is sufficient that he has it; and that may be secured to him, where his testator was the sole appellant, by a rule to shew cause why the appeal should not be struck off; but where both have appealed, simply by a notice. My objection to bringing the executor on the record is, that by doing so you blend responsibilities that are different in their nature and extent: and, beside, you may sell the land of one on a judgment against another who had not the least imaginable interest in setting up a defence. Suppose the executor, on the return of the *scire facias*, should refuse to appear: for what would you take judgment? Suppose he becomes a party and there is a verdict for the plaintiff for a sum as great as was found by the arbitrators: is it to be against the executor and surviving defendant jointly, or only against the executor; and for what? There cannot be a separate judgment against each, where the jury are sworn as to both: as I apprehend, they must be, where both defendants have appealed. In either event is it to be *de bonis testatoris* or *de terris?* Suppose the verdict is for a greater sum than has been found by the arbitraors: is it to have effect to its full extent; or is it to be inoperative as to the excess? All this and much more would be avoided by permitting the heir or terre tenant to come in on a rule to shew cause, plead collaterally, and abate, (if he can) the judgment of the arbitrators under the name of the survivor as the legal defendant. If he should refuse to appear, the rule would be made absolute: if he should appear, but fail to obtain a verdict more favourable than the report, the judgment would be *de terris;* which would, in either event, leave the judgment of the arbitrators in full force. On this, execution would issue, in the first instance, against the survivor, just as if there had been no appeal, and the other defendant had died after the filing of the report, but before execution. If the survivor should prove insolvent, a special action adapted to the circumstances of the case, would reach the assets in the hands of the executor of the deceased defendant: as in *Lang* v. *Keppele*, 1 *Binn.* 123. But the plaintiff might also proceed on the judgment of the arbitrators against the lands of both, by a *scire facias* against the survivor and the heir and terre tenant of the deceased,

according to the method pointed out in *Serjeant Williams's* note in 2 *Saund.* 51. a. I say the *heir* or *terre tenant;* for I am not aware that our vicious practice has been applied to a *scire facias* to revive a joint lien. This particular kind of *scire facias*, although not expressly given by, yet necessarily resulted from, the stat. *Westm.* 2. 13 *E.* 1. *c.* 18, which was the first Act of Parliament that made judgments a lien on real estate; for when the statute permitted the owner to charge his land by subjecting a moiety of it to execution, the Courts immediately held, that a joint judgment did not survive as to the real estate, but that the lien continued on all the lands that were originally bound. Why this statute was not reported by the Judges, as being in force here, I am at a loss to imagine. It is the source from which flows the whole doctrine of the lien of judgments; and it is expressly referred to by our Act of 1705, as furnishing a guide in the method of levying a debt or damages by an extent. This particular species of *scire facias* therefore partakes, in a great degree, of the nature of a *statutory* remedy, and is not so liable to receive its force from usage, as one, which is the creature of the common law. But whatever be its form, its nature is very different from the *scire facias* proposed to be issued in the present stage of the proceedings in the case before us. Under the statute, the writ issues against *all* the original parties, to *revive* a *final* judgment: here it is proposed to issue it against the executor of but one of the parties, to bring him in to *avoid* an *interlocutory* judgment, or abide the final judgment of the Court. In the course I have pointed out, complete justice may be done without the least violence to the common law principle of survivorship. As far as it may be necessary to carry the intention of the Legislature into effect, I have no objection to fill up their outline with a bold hand; but to bring deceased parties again on the record, in the person of their representatives, instead of pursuing those who remain, as the others file off, would introduce all that complication of unequal and discordant responsibilities, which the principle of survivorship is so admirably calculated to avoid. You cannot, to avoid this complication, drop the survivor where he has joined in the appeal; because he is then substantially, as well as formally, the party on the record; and if you join the executor, it

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must be as a party jointly liable. But suppose that you do drop him and call in the executor to defend separately: you call in a party who neither has, nor can have, an interest in the question, and exclude the very person who has; which is still worse. In ordinary cases, the heir, or terre tenant, has some security that the executor will make the best defence he can; because the judgment, if adverse, will affect the personal assets as well as the land, and therefore, by possibility the executor himself; but here, unless the judgment would reach assets, which by the common law were absolved, (to say the least of it, a strange anomaly on the other hand,) it would be altogether indifferent to him whether the plaintiff should recover or not. But, indeed, if there be judgment against the executor for form's sake, I do not see how the plaintiff can be restrained from taking execution on it, and the *scire facias* would therefore have the effect of materially varying the common law liability of the parties: but if it is to be against the land, the heir, or the terre tenant, is the proper person to defend; and the name of the executor can answer no better purpose on the record, than can that of the surviving defendant. In every way you are involved in a labyrinth of difficulties. I am therefore against bringing in the executor, in any event.

Little remains to be said on the other parts of the case. According to my view, the appeal in the first action was pending when the second was commenced. But take it that it was at an end, and the result is the same. A plaintiff who has recovered jointly against the obligors in a bond, or against the survivor, where one has died after the commencement of the action, can never sue again on the bond, although it may be several as well as joint. His remedy is, as I have said, against the survivor, and the heir, or terre tenant of the deceased. But in case the survivor prove insolvent, he may in a new action, (*but not on the bond,*) recover against the executor. The present action could be sustained only by adopting the notion that the proceedings in the first action were a nullity; which is against all reason. Here the special plea sets out the proceedings exactly as they took place; and whether they shew another action depending, or a former recovery for the same cause, the plea is supported; and the judgment must be affirmed.

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DUNCAN J.—The defendants proved the issue tendered to the Court; they produced the record of a judgment as set forth in their plea. A judgment of record against both defendants in a joint action unreversed, was a bar to the plaintiff in a new action against one of the obligors, or his representatives. From the time of the entry of the report of arbitrators, the law has declared it shall have the effect of a judgment against the party against whom it is made, and be a lien on his real estate until such judgment be reversed on appeal. Unless an appeal is entered within twenty days, it is made the duty of the prothonotary, on application of the plaintiff, to issue execution on such judgment obtained as aforesaid. Though it is not in every respect a judgment, it has many of the qualities of a final judgment. At the end of twenty days, without appeal, a writ of error will lie on it. In the distribution of a decedent's effects among his creditors, it would rank as a judgment. On a sale made by the Sheriff on a younger judgment, notwithstanding the appeal, the Sheriff would be bound to retain in his hands the amount of the sum *reported*, until the judgment was reversed on appeal. If two enter into a bond, and one dies before judgment, the survivor shall be charged alone. *Lampton* v. *Collingwood*, 4 *Mod.* 315. So where on a judgment in debt against two, one died; the plaintiff brought *scire facias* against the survivor only; the defendant pleaded that the other had left land, and an heir on whom it descended, and demanded if he should answer without the heir being warned: on demurrer, judgment was that he should answer; for the judgment is against the person, and although the statute of *Westminster* gives the *scire facias* and *elegit*, and he may charge the land and make it real; yet it is at his election to proceed on the personalty if he will. But if he will take out execution upon the real lien, the charge must be equally against both, and the *scire facias* against both. But if he brings a *scire facias* against both, and has judgment on it, he may have a *fieri facias* against the survivor, or an *elegit* against both. *Trethewy* v. *Ackland*, and *Green* v. *Same*, 2 *Saund.* 51, *a*, *note* 4. *Smarte* v. *Esmond*, 1 *Lev.* 30. *Sir T. Raym.* 26. For where lands of several are charged with a debt, it shall not wholly lay on the survivor. This report, on its entry, is made a charge and lien on the lands of *both*, until the judgment is reversed on ap-

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peal. The plaintiff had his election; he might have brought separate actions on this joint and several bond; but when he has made his election, and treated it as a joint bond, he is bound by it, and this obligation on which a joint action has been brought, and a joint judgment obtained, must be considered to every legal intent, to be a joint obligation. The judgment must stand affirmed; but as in the argument difficulties were suggested as to the remedy of the plaintiff against the executors of the deceased obligor, and the mode to be adopted on the state of this record, in the first action, to reach his estate, the surviving obligor being alleged to be insolvent, I will state what appears to me to be the proper course to render, at least, his land liable to the payment of this judgment.

In the introduction of any new system, the most circumspect and experienced legislator will omit many provisions necessary to the complete operation of his plan. Practice will discover these defects. To supply some of them, may exceed judicial power; yet it is the duty of the Courts, to give efficacy to the law by adopting and applying analogous proceedings under the common and statute laws, and though they cannot make laws, they may mould the forms of the ancient laws to the exigency of the new case. In the *Register of Writs*, the most ancient of books, and of the greatest authority, Lord COKE in the preface to his 10th *Reports* observes, "by force of Acts of Parliament in succeeding ages, divers other writs *original in cases newly happening*, are added thereunto;" and in *Hall's Journal of Jurisprudence*, *vol.* 1. *No.* 2, *fol.* 248, will be found a form of writs of *scire facias quare executio non* against the executors of a deceased defendant, in a judgment in debt against two, the survivor being insolvent, from the records of the Supreme Court of this State. *Stephen Dutilh* v. *Abraham Mason* and *Robert Smith*, *July* 1789. And it is to the reasonable exercise of this legal discretion, that we owe the great improvements made in modern times in our judicial system. How different is the practice in the time of MANSFIELD, from that which prevailed in the days of COKE! How beneficial has the change proved to the administration of justice! I do not mean by this, a departure from rules of property, which can only be altered by the Legislature; but the application of ancient

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principles, and the introduction of new forms to new cases, when they arise. In this State, from the want of a Court of Chancery, much has been done, necessarily and beneficially, in this way. One step, which was at first by some pronounced a bold one, but which since has received the approbation of all, our predecessors took on this very subject of joint debts, in *Lang and others* v. *Keppele's executors*, 1 *Binn.* 123. In order to reach the estate of a deceased partner, where the survivor was a certificated bankrupt, an action for a partnership debt was sustained against his executor. The Court considered it a fair case for controlling the form of action so as *to give effect* to their equity powers. That in some way the defendants, the executors of the deceased obligor, should be reached, or the lands of the testator, which are assets in his hands for the payment of debts, have came by operation of law, in this State, into his hands for payment of debts, charged with the payment of this debt as a judgment, if the plaintiff chooses to proceed on this lien, we all agree, though we differ in the mode. As this judgment by the clear letter of the law continued a lien on the land of the deceased, it is equally clear that it did not fall wholly on the land of the survivor; and the law is well settled that if the plaintiff chooses to take out an execution upon the real lien against both, the *scire facias* for that purpose must be brought against both. And as for the purpose of trial on the appeal, the judgment is not final, though for many purposes it is, I cannot see any incongruity in proceeding on the Act of 13th *April*, 1791, by issuing a *scire facias* or citation against the executors, and on their being made parties, going on to trial on the issue joined in the cause, or any other that may be tendered by them; and if the verdict should be for the plaintiff, then for every purpose the judgment becomes final, and the *scire facias* may then well issue against the executors and the survivor, as in *Smarte* v. *Esmond.* And as in this State lands are assets for the payment of debts in the hands of executors, and it has been the constant practice to issue a *scire facias* against them on a judgment obtained against the testator, and not against the heir and terre tenant, and then to take out execution against the lands of both, it would seem to me to present a course clear of difficulty, and in the ordinary course of proceeding, or as nearly so, as the state of

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the record would admit; forms preserved and well adapted to carry into effect the intention and spirit of the law. This course is simple, unembarrassed, and in conformity with the general practice of the State in proceedings against the executors, who as to land represent the testator with respect to payment of his debts, and I cannot see any good reason or necessity for departing from it in this cause, and it keeps up that uniformity so desirable in judicial proceedings. I am not entirely satisfied whether in a case of actual insolvency of the survivor, and the debt being the proper debt of the deceased obligor, or he did not come in as security, but was in point of conscience bound to pay, the plaintiff might not, within the principle of *Lang* and *Keppele*, take a general judgment on the *scire facias*, and this would afford an additional reason for bringing in the executors. I do not give any opinion how this would be, or whether in such case, the execution might issue generally, or be confined to the land. All that at present I give an opinion on is, as to the mode of bringing in the executors as parties to the original action, and making the judgment against the survivor, and against the executor as available as it is *England*.

Judgment affirmed.

DAWSON *against* CONDY.

Monday, October 22.

IN ERROR.

The right of appeal from an award of arbitrators, where given by Act of Assembly, cannot be taken away, except by an agreement in writing, made part of the proceedings in the Court, or before a justice, where the suit is before him.

ERROR to the Court of Common Pleas of *Cumberland* county.

This was an amicable action to recover damages for non-performance of a contract, not exceeding 100 dollars, brought by *Redmond Condy* against *Michael Dawson*, and entered by

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agreement of the parties before a justice of the peace of *Cumberland* county. All matters in variance between the parties, were agreed by them, before the justice, to be referred to three referees, who on the 21st *August*, 1820, awarded in favour of the plaintiff, for forty dollars and costs. On the 24th *August*, 1820, the defendant, *Dawson*, appealed to the Court of Common Pleas, and entered security. In *September*, 1821, the Court on motion of the plaintiff, granted a rule to shew cause why the appeal should not be struck off, on the ground that the parties had agreed that the award of the referees should be final, and that no appeal should be made from their award. There was no such agreement in writing of record before the magistrate, or in the Court below, or now produced, but the plaintiff alleged, that it was a verbal agreement between the parties, made at the time of their agreeing to enter the action before the magistrate, and also, while the case was pending before the referees. On these points the depositions of the magistrate and referees were taken, by virtue of a rule to take depositions, granted by the Court below, and were now returned with the record. The Court of Common Pleas decided, that such agreement had been verbally made at the time when the parties agreed to enter the action before the magistrate, and that by this agreement the right of appeal was taken away. They therefore dismissed the appeal.

Metzgar, for the plaintiff in error, assigned as error,

1. That an agreement not to appeal is not binding, unless it be in writing. 2. That there was no evidence to prove the alleged agreement. The witnesses contradicted each other.

Alexander, contra, contended, that the appeal was properly dismissed, as being in violation of the agreement of the parties. There could be no question but such an agreement would be binding if it were in writing. It was decided in *Galbreath* v. *Colt*, 4 *Yeates*, 551, that an agreement filed, that there shall be no appeal, is binding. An agreement not to take a writ of error is binding. 2 *Binn.* 169. An agreement of record not to appeal is binding. 4 *Mass. Rep.* 516. There is no rule of law or reason which requires that such an agree-

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ment should be in writing: more especially where it is a part of the agreement to refer, and prior in time to the appearance of the parties before the magistrate.

Metzgar, in reply, observed, that he could find no case where an appeal had been dismissed on account of an agreement not to appeal, unless the agreement were in writing. In all the cases cited, the agreement was of record. In the present case, the agreement was by no means clearly proved. Besides, the agreement to refer in the usual way was of record, and cannot be varied by parol evidence.

The opinion of the Court was delivered by

GIBSON J.—The appeal, being secured by an express provision of a statute, instead of resting on the discretion either of the justice or the Common Pleas, is a legal right which can be relinquished only by an express agreement. On an application to quash, by what kind of evidence is such agreement to be established? Not by parol; for it could not be put on the record; and a superior Court, therefore, could not inquire whether it were sufficient to justify the judgment of the Court below. It is no answer to say, the inquiry may be on depositions filed in the cause, and that the evidence may thus be subjected to the inspection of the superior Court. A Court of Error cannot look beyond the record, and nothing is more certain than that a paper does not become a part of the record, merely by being filed. But, admit that the Judges of the superior Court might look at the depositions; are they to become triers of the facts? That would require them to decide on the credibility of the witnesses: a matter about which they must necessarily be absolutely ignorant. Depositions can be put on the record only by a bill of exceptions, and even that, required the authority of an express statute: they can therefore be made the groundwork of a writ of error in no case where the bill of exceptions does not lie. It is said the Court may inquire by parol evidence into the grounds of a motion to quash a writ; and why not, to quash an appeal? The difference is obvious. Every Court necessarily has a discretionary controul over its own process; in the exercise of which, its judgment is subject to the revision of no tribunal

whatever: the appeal is a matter of right, which, if denied by the Court to which it is made, may be claimed in the Court of the last resort. I therefore take the distinction to be this:—A Court may inquire by parol evidence, as to any matter that is purely within its own discretion: but where the matter is the subject of a writ of error, it can consider of nothing which is incapable of being made a part of the record, and as such the ground of an exception in the Court above. The right of appeal, therefore, cannot be relinquished, except by an agreement reduced to writing, and made part of the proceedings, either before the justice, or in the Common Pleas. Beside this, the evidence on which the motion was decided, was offered to add to the written agreement of reference before the justice; and on that ground it should have been rejected. The judgment is reversed, and the record remitted to the Common Pleas, with directions to reinstate the appeal.

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Judgment reversed.

HYSKILL *against* GIVIN.

IN ERROR.

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ERROR to the Court of Common Pleas of *Huntingdon* county.

In action by one, as Sheriff, to recover the purchase money of land sold at Sheriff's sale, the return of such Sheriff is *prima facie* evidence to prove that the defendant was the purchaser. A levy and Sheriff's deed describing the land as "a tract in the name of A. B., containing 300 acres more or less," is sufficiently certain in the absence of extrinsic proof.

Patrick Givin, the plaintiff below, brought this suit against *George Hyskill*, before a justice of the peace, to recover fifty dollars and interest, for the price of a tract of land sold by him under an execution as Sheriff of the county, to *George Hyskill*, the highest and best bidder therefor. There was an appeal to the Court below, from the judgment of the justice. On the trial, after proving the judgment at the suit of

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Michael Wallace against *Evans* and *Dorsey*, on which the execution issued, the plaintiff gave in evidence a *fieri facias* issued to *April* Term, 1816, and returned, levied, *inter alia*, on a tract in the name of *Mordecai Massey*, containing 300 acres, more or less; and a condemnation of the same. He also gave in evidence a *venditioni exponas* to *April* Term, 1818, to which there was a return made by himself, as Sheriff, "Sold the tract in the name of *Mordecai Massey* to *George Hyskill* on the 18th *March*, for fifty dollars." The plaintiff further produced in evidence a deed from him to the defendant for this tract, acknowledged in open Court on the 18th *April*, 1818, which, it was proved, was tendered to the defendant previous to the commencement of this suit. The defendant produced no evidence, and the Court charged the jury as follows. "The Sheriff here is not suing to put money in his pocket; he is suing in his official capacity to recover the price of this land, for the plaintiff in the suit on which it was sold. In an action of trespass, the Sheriff's return is given in evidence to defend him. It may, in some cases, be disproved, but it is evidence for him. So, in an indictment against him. Here it has been read without objection, and unless disproved, is sufficient in connection with the acknowledgment of the deed, to prove a sale to *George Hyskill*. It is said, there must be proof that there is in existence such a tract of land. We are of opinion, that after a levy and inquisition and sale, it is to be taken that there is such a tract of land, and that the purchaser, if he alleges the whole to be a fraudulent sale of what does not exist, must give evidence thereof." To this charge the defendant excepted. The jury found a verdict for the plaintiff.

Shippen, for the plaintiff in error, contended,

1. That there was no evidence that the defendant had made the contract, except the return of the plaintiff, which was not sufficient. 2. There was no such land in existence, as that alleged to have been sold: and the deed contains no sufficient description of the land; and cited *Dolan* v. *Briggs*, 4 *Binn.* 498. 3 *Caines*, 68. 2 *Johns.* 259. 2 *Caines*, 61. 13 *Johns.* 551.

Burnside, contra, cited the *Act of* 1705, 1 *Sm. L.* 57. 18 *Vin.* 173. *Phillips* v. *Hyde*, 1 *Dall.* 439. *Cro. Eliz.* 872. 2 *Mod.* 10.

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GIBSON J. delivered the opinion of the Court.

The question is, whether the return of a Sheriff is evidence, in his own favour, of the fact stated; for if competent, it made out the plaintiff's case, and justified the Court in charging that he was entitled to recover in the absence of contradictory proof. There is no rule better established, than that such return is *prima facie* evidence in an action between third persons; because it is the official act of a man acting under oath. I see no reason to draw a distinction, where it is offered by the Sheriff himself. It is not, as in ordinary cases, the man's own act, which may, at the time, have been done with a view to his interest, but official; and therefore the act of the law, performed under the sanction of an oath, and at a time when it cannot be presumed the officer anticipated the existence of a law suit which should implicate him personally. Precisely for the same reason, a conviction by a justice of the peace, having jurisdiction, is evidence in his own favour, in an action against him for false imprisonment. *Phill. Ev.* 260. The only difference is, that the conviction is conclusive; but that is because it is a judicial determination of the fact: the act of the Sheriff is only ministerial. The argument *ab inconvenienti*, deserves but little consideration. It is said that to require the person implicated as the purchaser, to produce rebutting evidence, would be to require him to prove a negative; a matter attended with more than ordinary difficulty in cases of Sheriff's sale, where the business is transacted with celerity, amidst confusion, and where a nod of the head or any other signal equally inexplicit and subject to misconstruction, is taken for a bid; and hence it is argued, that to receive the return as *prima facie* evidence, would subject every one present, to the Sheriff's mistakes, and the consequent risque of being involved in ruinous speculations without any means of extrication. Experience however proves, that these mistakes seldom, if ever, occur; and if they even should, it is almost impossible that the attention of the other bidders, usually alive to every thing passing, should not enable them to testify to the true state of the facts. The jury would have to consider of all the circumstances, and might require but slight proof to counterbalance the return. Here the special circumstances of the sale, were facts proper to be returned

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by the Sheriff, and there is therefore no error on the ground of the first exception.

It is objected that the description of the land in the deed tendered, is too loose to attach it to any particular tract. The deed itself has not been produced; but it is to be presumed the description was taken from the levy which, *inter alia*, was: "on a tract in the name of *Mordecai Massey*, containing 300 acres more or less." This, on its face, is reasonably certain, and could be rendered otherwise only by the existence of extrinsic circumstances, which did not appear. If but one tract in the county were located in the name of *Massey*, there could be no difficulty: if more than one, the subject of the grant would have to be ascertained by extrinsic evidence, as in every other case of latent ambiguity. These levies are much more loose and uncertain than convenience requires, or safety can justify; but, as many titles depend on them, it is now too late to scrutinise them very strictly. The judgment is affirmed.

Judgment affirmed.

DENISON'S executors *against* WERTZ for the use of KIPP.

Monday, October 22.

IN ERROR.

If a tenant agree to purchase land of one who purchased from the landlord, and a conveyance is to be made some months after, up to which time the tenant is to pay the same rent as at present, it is a surrender of the lease, and the purchaser is in possession.

The Court are bound to decide on the construction of a written instrument, where matters of fact are not intermingled, and it is error in such case to leave the construction to the jury.

ERROR to the Court of Common Pleas of *Bedford* county.

The case was argued by *S. Riddle*, for the plaintiffs in error, and *Todd*, for the defendant in error.

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The opinion of the Court was delivered by

TILGHMAN, C. J.—This is an action of covenant brought by *Henry Wertz*, the *nominal* plaintiff below, for the use of *John Kipp*, against the executors of *Hugh Denison*, on a single bill for 1,000 dollars given by *Denison* to *Wertz*, dated the 10th *May*, 1811, and payable the 10th *May*, 1812, "provided *Denison* received possession of the property he had purchased of *Wertz*, and if possession should not by that time be delivered to him, then the said sum of 1,000 dollars was to be payable on *Denison's* receiving possession according to the article of agreement between him and *Wertz*." By these articles dated the 10th *May*, 1811, *Wertz* agreed to sell to *Denison*, in consideration of 4,000 dollars, a certain tavern, and part of two lots of ground in the borough of *Bedford*, then in the occupation of *Thomas Moore*, subject to a term which was to expire on the 15th *November*, 1814. *Denison* was to have the rent to become due from the 1st *April*, 1811, at the rate of 240 dollars per annum. It was agreed that an advance should be made to prevail on *Moore* to surrender the term before the time limited for its expiration, and *Denison's* last payment for 1,000 dollars for which the single bill now in suit was given, was to depend on the time of his receiving possession. In pursuance of this agreement, *Wertz* conveyed the property to *Denison*, and as the title was disputed, he also gave him a bond of indemnity, with sureties. On the 20th *January*, 1813, *Denison*, who had received possession, entered into articles of agreement with *Moore*, the tenant, by which he agreed to sell the property to him, for 5,000 dollars, and give him a conveyance on the 1st *June*, 1814; up to which day *Moore* was to pay rent to *Denison*, *at the same rate as the present rent*. *Wertz* assigned the single bill of *Denison* to *John Kipp*, for whose use this suit was brought. On the trial, the defendants set up a claim against *Wertz*, by way of discount, *viz.* that *Wertz* had received from *Moore* part of the rent, which according to the articles of agreement was to go to *Denison*, for the amount of which, with interest, they were entitled to a credit. There was another article also for which they claimed credit. In the lease from *Wertz* to *Moore*, which was in existence at the time of *Wertz's* sale to *Denison*, was

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included a five acre lot, besides the property sold to *Denison*, for all which, *Moore* was to pay a rent of 240 dollars a year. It was proved, that *Moore* could not enjoy this five acre lot, because *Wertz* had sold it to Doctor *Anderson*. Evidence was given that it was worth about thirty dollars a year, and the defendants contended, that as *Moore* had a right to deduct thirty dollars a year from the rent, they were entitled to a credit for the same against *Wertz*. Whether *Wertz* had received any of the rent which ought to have gone to *Denison*, and if any, how much, was matter of dispute between the parties. On the conclusion of the evidence, the President of the Court of Common Pleas, gave a charge to the jury in which several errors were assigned, which we are now to consider.

1. It is assigned for error, that the jury were instructed "that *Denison* obtained possession of the property purchased of *Wertz*, on the 20th *January*, 1813, by virtue of the articles of agreement with *Moore*, bearing date that day." This opinion was certainly correct. When *Moore* agreed to purchase, and *Denison* agreed to sell, the possession was virtually delivered to *Denison*. So both parties considered it, for they made a new agreement as to the rent, *viz.* that *Moore* was to pay rent up to the time of receiving his conveyance, *at the same rate as before*. This amounted to a surrender of the existing lease. There is no error therefore, on that point.

2. It is said, the Court ought to have charged the jury, that the defendants were entitled to a credit of thirty dollars a year, on account of the five acre lot. The charge was, that as *Denison* did not purchase the five acre lot of *Wertz*, and *Moore* did not object to paying the whole rent of 214 dollars a year, it was immaterial to *Denison*, whether *Moore* enjoyed that lot or not. I perceive no error here. *Wertz* covenanted that *Denison* should receive rent from *Moore*, amounting to 214 dollars a year, and *Moore* claimed no deduction on account of the five acre lot; he went on to pay 214 dollars a year. So we must take the facts to be, for on that statement of facts the law was declared to the jury. What right then had *Denison* to a discount, when he received all that *Wertz* covenanted he should receive? If he had lost part of

the rent of 240 dollars, he might have recourse to *Wertz* for satisfaction. But having lost nothing, he can have nothing to claim.

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3. The third error is, that the jury were told, "that after the agreement between *Denison* and *Moore*, *Denison* was estopped from saying that *Moore* had paid the rent to *Wertz*, before *Wertz* had sold to *Denison*." In the assignment of this error, the charge of the Court is not accurately stated. What the Court said, was, "that after *Moore* had agreed to pay the rent to *Denison*, neither *Denison* nor *Moore* can say that it was extinguished by a payment to *Wertz;* for here is a new covenant to pay to *Denison*, and by *Denison* to look to *Moore* for it, from that date." This is sound reasoning. Although *Moore* had made a payment to *Wertz*, yet if he afterwards agreed to pay to *Denison*, it was all that *Denison* could ask. It was all that *Wertz* covenanted for. And as for *Moore*, he could not plead in bar of his covenant, that he had made payment to *Wertz*, before he covenanted to pay to *Denison*. But what was the covenant between *Moore* and *Denison?* It is in these words. "The rent of the premises shall be paid by the said *Thomas Moore*, to the said *Hugh Denison*, *at the present rate*, up till the first day of *June* next." I think it is confined to the rent between the date of the articles, and the 1st *June*, 1814. This appears from the expressions, *at the present rate*, because these expressions could with no propriety be applied to the rent which had become due before; nor was there any occasion to make provision for that rent. It was a debt, which would not be extinguished by the sale to *Moore*. But it might be supposed that the articles of agreement dissolved the old relationship of landlord and tenant, which existed between *Denison* and *Moore*, by virtue of the old lease, and therefore if it was intended that *Moore* should continue to pay rent, it was necessary to ascertain precisely how long he was to pay it, and at what rate. The construction of this covenant, was of great importance to the defendants, because if it did not embrace the rent due *before the date of the articles*, then the defendants might support their claim to set off against the plaintiff the amount of rent due before the date of the articles, which the jury might think that *Wertz* had improperly received of *Moore;* and so the Court charged the jury. But

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the construction of the covenant was expressly left to the jury, and this is the fourth error assigned.

4. I agree with the President of the Court of Common Pleas, in all the opinions he has expressed; but I must differ from him as to the propriety of withholding his opinion from the jury on the construction of this agreement. This is a matter of very great importance. The security of property depends on it; for there is no appeal from the decision of a jury. The injured party may indeed move for a new trial, but that the Court may grant or refuse, at its discretion. It is the right therefore, of every suitor, to have the opinion of the Court on such matters as by the law of the land the Court is bound to decide, and one of these matters is the construction of written contracts. There may be cases, in which extrinsic circumstances are so connected with a writing as to render it necessary to leave the whole to the jury. But this was not such a case. Here was an agreement to pay rent, intermingled with no facts which operated on the construction. The jury indeed would have had to decide, in case it had been material in this action, what *was the rate of the present rent*, but the time for which it was to be paid, was to be determined from the writing itself, and was exclusively the province of the Court. This principle has so often been decided, and is so well settled, that it is hardly necessary to cite authority in support of it. I will refer however to opinions delivered by this Court, in the cases of *Welsh* v. *Dusar*, 3 *Binn.* 337, and *Wharf* v. *Howell*, 5 *Binn.* 503; and to the opinion of the Supreme Court of the *United States*, in the case of *Levy* v. *Gadsby* 3 *Cranch*, 186. Upon the whole then, I am of opinion, that there is no error in the record, except in leaving to the jury, the construction of the articles of agreement between *Denison* and *Moore*. But in that there is error, and therefore the judgment must be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

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KLINE *against* SHANNON.

October.

APPEAL.

The register of wills is not entitled to the fee of two dollars and fifty cents, for examining and passing the account of a guardian.

The opinion of the Court was delivered by

TILGHMAN, C. J.—This is an appeal from the Orphans' Court of *Cumberland* county, and the only question is, whether the appellant, who is register of wills for the said county, is entitled to a fee of two dollars and fifty cents, *for examining and passing the account of a guardian.* No such fee is allowed in the last fee bill, (28th *March*, 1814,) by which the fees of officers are now regulated, nor was it allowed by the fee bill of 20th *March*, 1795, which was repealed by the Act of 28th *March*, 1814. But the appellant contends, that it is given by the old Act of 27th *March*, 1713, and not taken away by the Act of 28th *March*, 1814. The Act of 27th *March*, 1713, gives authority to the Orphans' Court, to call all guardians before them, and cause them to make and exhibit true and perfect inventories and accounts of the estates of Orphans wherewith they have been entrusted; and to oblige the registers of wills to bring, or transmit to the said Court, true copies or duplicates of all bonds, inventories, accounts, actings and proceedings whatsoever, remaining or being in their offices, and relating to the said estates; *and to order the payment of such reasonable fees for the said copies, and for all charges, trouble and attendance which any officer or other person shall necessarily be put to, in the execution of the said Act, as the said Court shall think reasonable and just.* Now, in the first place, it does not appear, that the examining and passing of a guardian's account, was a service done in the execution of the Act of 27th *March*, 1713. All the services spoken of in that Act, are, the making copies of papers remaining in the register's office, and transmitting them to the Orphans' Court. No mention is made of *examining and passing a guardian's account*, and if the register had power to pass such an account, it must have been by virtue of some other Act of Assembly. But even if the fee in question might have been charged under the Act of 27th

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March, 1713, it was taken away by the 26th section of the Act of 28th *March*, 1814, which forbids any officer to charge a fee for any service, *other than those expressly provided for by that Act.* Indeed one main object of the last mentioned law was, to cut up by the roots, the power which had been exercised by the Courts of justice, of allowing fees called *compensatory*, for services not specified in the several fee bills. It is true, that in the last part of the same 26th section, the Judges were prohibited to allow *compensatory fees* for any services not specified in that Act, *or some other Act of Assembly;* but the words *some other Act of Assembly* seem intended to relate to Acts which might afterwards be made; for it cannot be supposed, that after providing a table of fees for the register of wills, and other officers, and expressly forbidding all the said officers, to charge any fee not therein specified, it could have been the intent of the Legislature to permit the Orphans' Court to allow *at their discretion*, fees for services not included in the said table of fees. I am therefore of opinion, that the Orphans' Court decided right, in refusing to allow this fee, and their decree should be affirmed.

Decree affirmed.

BUTLER and others *against* DELAPLAINE.

IN ERROR.

October.

If an owner of slaves in Maryland, lease a farm there with the slaves to cultivate it, the consent of such lessee that one of these slaves should be removed to Pennsylvania, and his being brought here will not entitle him to freedom to the prejudice of the lessor.

The sojourning of a master, a citizen of another State, with his slave in this State at different times, will not entitle such slave to freedom, unless there was at some time a continued retaining of the slave here for six months, unless perhaps in case of a fraudulent removal backwards and forwards.

Every slave removed into this State from another, without the consent of his master, may be considered as absenting himself, absconding or clandestinely carried away, under the Act of 1st March, 1780, and is an escaping under the 2d section of the 4th article of the Constitution of the United States.

ERROR to the Court of Common Pleas of *Adams* county, in *homine replegiando* brought by *Henry Butler* and

Charity his wife, and *Harriet Butler* and *Sophia Butler*, their children, against *John Delaplaine*.

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Charity Butler was admitted to be the slave of *Norman Bruce*, an inhabitant of the State of *Maryland*, and still to continue a slave unless she obtained her freedom by the laws of this State; and if she were free, her children born after her emancipation, were likewise free. *Norman Bruce*, in 1782, was the owner of a tract of land in *Maryland*, stocked with a number of slaves, and demised it, with the slaves to cultivate it, to one *Cleland*, and removed to a place seventy miles distant in the same State. Shortly after the lease, *Cleland* entered into a contract with one *Gilleland* respecting *Charity*. *Gilleland*, for her services, was to feed and clothe her until her arrival at sixteen years of age. *Gilleland* was an inhabitant of *Maryland*. A separation took place between *Gilleland* and his wife, and Mrs. *Gilleland* being left destitute, was obliged to support herself and an infant child. She quitted housekeeping, and went to reside with her mother in the house of Mrs. *Patterson*, who lived in *Maryland*, near the line between that State and *Pennsylvania*, taking *Charity* with her. She was a seamstress and occasionally went into *Pennsylvania* to work, taking the child and *Charity* with her to nurse it. She returned at intervals to her mother's in *Maryland*, which continued her domicil. Whether she ever remained with *Charity* at any one time for six months, was a fact left to the jury. She returned *Charity* to *Norman Bruce* when she arrived at the age of eleven years. Mrs. *Gilleland* never was an inhabitant of this State, and never came into it, with an intention of residing.

The counsel for the plaintiff, requested the Court to instruct the jury on certain points which, with the instructions of the Court, are stated in the charge of the Court.

Charge of the Court.—We are requested by the counsel of the plaintiffs to charge the jury, that if they believe *Charity*, the mother of *Harriet* and *Sophia*, resided in the State of *Pennsylvania*, for the period of six months, in the years 1788 and 1789, with the consent or connivance of *Norman Bruce* her master, or with the consent or connivance of Mr. *Cleland*,

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to whom *Norman Bruce* leased his negroes, that such residence entitles *Charity* to her freedom, under the Abolition Act of 1780; and that *Harriet* and *Sophia*, born after such residence of six months, are entitled to their liberty in consequence of the right of their mother. This request contains three distinct points, which we will answer in their order.

1. If you believe that *Charity* resided in *Pennsylvania* for a period of six months in the years 1788 and 1789, with the consent or connivance of her master *Norman Bruce*, such residence would entitle *Charity* to her freedom, under the Abolition Act of 1780, and the supplement of 1788.

2. The consent or connivance of Mr. *Cleland*, if without the knowledge or approbation of *Norman Bruce*, would not entitle *Charity* to her freedom, under the said Acts; and merely leasing the farm and negroes to *Cleland* by *Norman Bruce*, to cultivate the same, does not raise a legal presumption without other evidence of his consent or connivance.

3. *Harriet* and *Sophia*, being born after such residence, would follow the condition of their mother. If she is free, they are free also. If a slave, by being born in *Maryland*, they are slaves also.

We are further requested, on the part of the plaintiffs, to charge the jury, that a residence of six months in the whole, although compounded of periods shorter than six months each, with an interval of two or three weeks between them, during which *Charity* was removed into the State of *Maryland*, is a residence of six months, so as to entitle *Charity*, and her issue born afterwards, to their freedom, under the Abolition Act. The plaintiffs' counsel have rested their case, exclusively on the 10th section of the Act of 1780. Under that Act, there must be a single residence of six months. Different acts of residence, at different periods, cannot be tacked together, so as to make a whole; for each act of residence is a whole in itself. But on this point, we must go further in favour of the plaintiffs than their counsel, and contrary to their reasoning. Under the provisions of the 2d section of the Act of 1788, if *Charity* was brought by her master, or any one having legal authority from him, or having legal controul over her, with intention of residing or inhabiting in this State, she became immediately free. We

add that such authority and controul are not necessarily presumed in Mrs. *Gilleland, from her having procured Charity from Cleland, and the lease of the farm and negroes to him by Norman Bruce, to cultivate it, and work it, while he the master, removed seventy miles distant.*

At the request of the defendant's counsel, we state, that if you believe that neither *Cleland* nor Mrs. *Gilleland* were the agents of *Norman Bruce*, and that the removal of *Charity* into the State of *Pennsylvania* was without the consent or approbation of said *Bruce*, such removal would not entitle the plaintiffs to freedom, under the Act for the abolition of slavery. And if no authority directly or indirectly was given by *Bruce* to *Cleland*, or Mrs. *Gilleland*, to remove said negro to this State, your verdict should be for the defendant. The whole is before you for your decision.

The plaintiffs excepted to this charge, and the jury found a verdict for the defendant.

M'Conachy and *Dobbin*, for the plaintiffs in error, now argued, that the charge of the Court was erroneous in the following respects.

1. In stating that the consent of *Cleland*, the lessee of *Norman Bruce*, to remove *Charity* would not entitle her to her freedom. The Act of *March* 1st, 1780, sect. 10, *Purd. Dig.* 479, excepts from freedom the domestic slaves of persons sojourning in this State, and not becoming resident therein, provided such domestic slaves are not retained in this State longer than six months. The 2d sect. of the Act of 29th *March*, 1788, *Purd. Dig.* 480, declares, that this exception shall not extend to persons inhabiting or residing here, or coming here with an intention to settle and reside. The 11th sect. of the Act of *March* 1st, 1780, *Purd. Dig.* 480, contains a proviso as to absconding slaves, declaring the Act not to embrace them. The only slaves exempted, are absconding and runaway slaves: no others are exempted. *Cleland* was the lessee of the slave, and must be considered as the qualified owner. If the removal were for six months by his permission, it is embraced within the words and meaning of the Act: otherwise its salutary provisions might be evaded by the introduction of slaves into this State by

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lessees for a long term of years, and holding them as such in contravention of the object of the laws. The violation of the contract between *Bruce* and *Cleland*, by which the latter was to keep the slaves to cultivate the farm, might render *Cleland* responsible to *Bruce*, but cannot affect the quality of any done by *Cleland*, the consequence of which, our laws have declared shall be the freedom of the slave.

2. The second error was in the Court's stating that the sojourning of a master, a citizen of another State, with his slave in this State, would not entitle the latter to freedom, unless there was one continued retention of him here for six months. This also would render the law easily liable to evasion. A slave might be brought in and kept here during life, if the owner took care to remove him occasionally for a day or two, so as to break the continuity of the sojournment.

3. The third error was in the Court's casting on the plaintiffs the burthen of proof, that the removal and continuance of *Charity* was with the assent of *Norman Bruce*, or by his connivance. The proviso in the law being in favour of the master, it lies upon him to prove that the slave had absconded or runaway.

4. The fourth exception is, that the Court did not direct the jury that the lease by *Bruce* was *prima facie* evidence of his licence to take her out of the State.

Stevens, contra.

The lease to *Cleland* was for a special purpose, namely, to cultivate the land leased to him. *Cleland* had no right to carry any of the slaves out of the State of *Maryland*, or to authorise any other to do so, nor can it in any way be implied that he could have power to destroy the property of the lessor by removal into another State where the laws divested such property. As to continued residence for six months, it is clear that a slave who happens to come with his master on different visits, which may on adding up the time of their duration exceed six months, cannot be contemplated by the law. If there were any attempt made to defraud its provisions in the mode suggested, it might form a case for the Court to decide that the slave was free. But there is no such evidence or allegation in the present instance.

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The opinion of the Court was delivered by

DUNCAN J.—In giving a construction to this lease, we must take into view, the subject matter of the contract, the species of property to which it related, and the place in which the right of *Cleland* over the property, was to be exercised. If this were a general hiring of a slave in *Maryland*, to an inhabitant of *Maryland*, it would be difficult to maintain the right of the lessee or bailee to do an act which would extinguish the property itself. There would necessarily be implied an engagement on his part to restore the slaves. The contrary implication would be highly unreasonable. That he had authority to do an act which would put it out of his power to restore them, would be an instance of folly that cannot be imputed to any one capable of entering into a binding contract. But this was not a general hiring, but a special one. The negroes were demised with the land, for the purpose of cultivating the farm. Though this is a claim of freedom, we are not in favour of liberty to lose sight that this class of people are acknowledged as slaves by the laws of both States. The master has a property in them, and contracts respecting this species of property, are to be construed by the same rules of interpretation, that contracts respecting any other species of property are. We are not at liberty to infer a power of removal, when the contract itself takes away all implication, and states the very purpose for which they were hired, to cultivate this farm of *Norman Bruce*, devised by him to *Cleland*. It follows, that the decision of the Court was correct in stating that the consent of *Cleland* to remove *Charity* into this State, would not entitle her to her freedom. The continuing of a sojourner, must be a single, unbroken one, for six months. There may be cases of a fraudulent shuffling backwards and forwards into *Pennsylvania*, and then into *Maryland*, and then back to *Pennsylvania*. This might be in fraud of the law, and would present a different question; but here there is no evasion—no ground even for suspicion of evasion.

It was well known to the framers of our Acts for the Abolition of slavery, that southern gentlemen with their families, were in the habit of visiting this State, attended with their domestic slaves, either for pleasure, health, or business; year after year passing the summer months with us, their

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continuance scarely ever amounting to six months. If these successive sojournings were to be summed up, it would amount to a prohibition—a denial of the rights of hospitality. The *York* and *Bedford* springs are watering places frequented principally, and in great numbers, by families from *Maryland* and *Virginia*, attended by their domestic slaves. The same families with the same servants return in each season. The construction contended for by the plaintiffs in error, would be an exclusion of the citizens of our sister States from these fountains of health, unwarranted by any principle of humanity or policy, or the spirit and letter of the law. The retaining a slave for six months by a sojourner, may well be compared to the hiring and service for one year, to obtain a settlement under the poor laws, which must be an entire hiring, and an entire service for the year; or to the period prescribed as a limit to the recovery of real estate where the adverse possession must be continuous, unbroken and uninterrupted. It must be one hiring, and one entire service under the poor laws. It must be continued possession for one interrupted period of twenty-one years under the Limitation Act. And under this law, the retaining must be for one unbroken point of time—one entire six months, and cannot be made up of different points of time joined together.

I cannot agree with the counsel of the plaintiffs in error, that the Court did throw the *onus* of proof of the master's consent, on the slave. All they said, was, if it appeared to the jury from the evidence, that *Charity* was not brought into *Pennsylvania* with the knowledge or connivance of *Norman Bruce*, and no authority was given directly or indirectly by *Bruce* to *Cleland* or *Gilleland*, to bring her into *Pennsylvania*, she continued his slave. The fourth point is nearly the same as the second, for the reasons already stated, that the master's lease to *Cleland*, was no evidence of his leave to *Cleland* to bring her into *Pennsylvania*. It is so far from affording such *prima facie* evidence, of an intention to grant a licence to remove the negroes into *Pennsylvania*, that as clearly as language can exclude such construction, it is here done. It would not be a power necessarily incident to the use of the thing demised, because the slaves are to be used in the cultivation of the farm in *Maryland*. A presumption could not be raised of such intention, because it is

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against all reason and all probability. It is contended, that every slave brought into this State, and remaining here for six months, unless he is an absconding or runaway slave, became *ipso facto* free, and that whether the party removing him had authority or not, to bring him in. This construction would be a reproach to the framers of the Acts for the abolition of slavery, as it would be an outrage on the property of the citizens of another State, where slavery is tolerated—a confiscation and forfeiture of their rights, without any act done by them in violation of the laws of this State. It would be an invitation and reward offered to strangers who had no right or authority, to bring slaves into our State—to overseers, to bring over the gangs of negroes entrusted to their superintendance. Nay, on this principle, if the negro were stolen from *Maryland* and brought into this State, he would become free. The Legislature wisely and humanely desirous to abolish gradually slavery in this State, have cautiously preserved the rights of citizens of other States whose slaves *are introduced* into this State without their knowledge.

The 10th section of the Act of 1st *March*, 1780, provides, that no man or woman, of any nation or colour, except the negroes and mulattoes, who shall be registered, shall be holden within the territories of this Commonwealth as slaves or servants for life, except domestic slaves of delegates to Congress from other States, foreign ministers, &c., and persons passing through and sojourning in this State.

The 11th section provides, that the Act shall not give relief or shelter to any absconding or runaway negro or mulatto slave or servant for life, who has or shall absent himself from his or her owner or master; but he shall have right and aid to demand, claim, and take away his servant or slave, as he might have had in case this Act had not been made, and that all negro and mulatto slaves now owned and heretofore resident in this State, who have absented themselves or been clandestinely carried away, before the passing of this Act, may be registered within five years. Absenting themselves, absconding, being clandestinely carried away, in all these cases, I am of opinion, that the interest of the master is secured; the slave who is removed into this State, without the consent or connivance of the master, may be considered as a slave absenting himself, absconding, or clandestinely carried away;

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and that such removal under the 4th article, section 2d of the Constitution of the *United States*, would be an escaping into another State; and that under that article, the slave coming into the State, in any other way than by the consent of the owner, whether he comes in as a fugitive or runaway, or is brought in by those who have no authority so to do, cannot be discharged under any law of this State, but must be delivered up on claim of the party to whom his services or labour may be due.

The opinion of the Court was, in all matters on which they were requested to charge the jury, entirely correct; and it was left to the jury with the opinion of the Court on the general question of law, with all accuracy, that if they believed that neither *Cleland* nor Mrs. *Gilleland* were the agents of *Norman Bruce*, and that if the removal of *Charity* into the State of *Pennsylvania* was without the consent or approbation of *Bruce* the master, such removal did not entitle the plaintiffs to freedom; and that if no authority directly or indirectly was given by *Bruce* to *Cleland* or *Gilleland* to remove *Charity*, that the verdict should be for the defendant. The judgment is therefore affirmed.

Judgment affirmed.

RIDDLE *against* The county of Bedford.

IN ERROR.

October.

An officer must make out a bill of particulars, if demanded, before he can maintain an action for his fees: but it is not necessary where the party knows the items, and objects to them *in toto*.

The purchaser of lands sold for taxes, under the Act of 13th March, 1815, cannot object to any irregularity in the assessment or the proceedings of the commissioners or treasurer.

On a sale for taxes to one person of different tracts of land, held by different persons, the fees are to be paid as for separate deeds on each tract.

Query, whether one deed embracing all would be valid?

A county treasurer, is an officer within the 8th article of the Constitution, and must take an oath of office: and he cannot sustain a suit to recover his fees as such officer, where he has not taken the oath, and there is no acquiescence in the defendant.

THIS was a writ of error to the Court of Common Pleas of *Bedford* county, in a suit brought by the County of

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Bedford against *Samuel Riddle*. The suit was brought to recover from him the amount of county and road taxes assessed, and due on 105 tracts of unseated land situate in *Bedford* county, sold at public sale by *Thomas R. Gettys*, treasurer of the county, to the said *Samuel Riddle*, he being the highest and best bidder for the same, and the costs and charges claimed by the said treasurer for advertising and sale and making out the deeds and bonds relating to the same, and the fees claimed by the prothonotary of the Court of Common Pleas, for receiving the acknowledgment of the deeds, amounting in the whole to the sum of 870 dollars, 67 cents. The plaintiffs filed a declaration and also a statement. On the trial of the cause below, certain points were proposed by the defendant to the Court, for their opinion, and an exception was taken by the defendant thereto given by the President of the Court.

1st point. That there is no proof before the Court, that the services charged by *Thomas R. Gettys*, late treasurer, were rendered by him.

Answer of the Court.—As to this, the jury have the facts before them, and are the sole judges what these facts prove, or whether they prove any thing.

2. That the plaintiff cannot recover in this case, not having proved a tender of a bill of particulars of the fees of prothonotary and treasurer, before the institution of this suit.

Answer of the Court.—The Court after reading that part of the evidence relating to this point, and the 27th section of the Act to establish a fee bill, passed the 28th *March*, 1814, instructed the jury, that they were the sole judges, whether the bill of particulars of the costs had been demanded or requested, before suit was brought. It is not necessary to make out the particulars of a bill of costs before it is demanded; but if the party do demand such bill, it must be made out and delivered, before a suit can be sustained.

3. That there is no proof that the taxes charged in the plaintiff's statement, were assessed and charged upon the lands sold to the defendant; or that the lands mentioned in the statement were unseated, or returned as such to the com-

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missioners, by any person acting in the capacity of an assessor or collector of taxes; and that the books given in evidence, do not contain any legal proof of such assessment.

Answer of the Court.—The books of the assessment, the books of all the commissioners, and the proceedings of the supervisors are before the jury. They ought to enter on their own books the rate per cent. assessed each year, and the amount claimed each year for each tract. It appears it is only noted on the assessment in the warrant to the collectors on the back of the duplicate. But the Court consider this only as an irregularity, and cured in this case, by the 3d section of the Act of 13th *March*, 1815. As to the facts in the conclusion of the point stated, it does appear in the triennial assessment, that these lands are returned at each triennial assessment, as unseated, and the valuation affixed; and the returns of the collection each year, stating what tracts remain unseated, are before you, and also the returns of the supervisor.

4. That the charges made for separate deeds for each tract are illegal, inasmuch as the defendant offered to write and prepare a deed for the lands to be executed by the treasurer, *Thomas R. Gettys*, which offer he refused to accept, and that the defendant, having offered to prepare such deed before any deed had been prepared by the said *Thomas R. Gettys*, which offer was refused, the charges of executing separate deeds cannot be recovered.

Answer of the Court.—This point was decided by the Court of Common Pleas of this county, before I was one of them. I doubt my power to reverse a decision of theirs, if disposed to do so. I concur in that opinion, given on the 5th *August*, 1816, that this objection is not valid.

5. That the charges cannot be supported, inasmuch as the said treasurer, never took the oath of office as treasurer.

Answer of the Court.—No law has been produced requiring the treasurer to take any oath previous to entering on the duties of his office. I do not think him included in the 8th article of the Constitution. It is the opinion of the Court, that the plaintiff may recover, if there is no other objection, notwithstanding his not having taken the oath required by the Constitution.

This case was argued by *Riddle* and *Thompson*, for the plaintiff in error, and *Tod*, for the defendant in error.

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The opinion of the Court was delivered by

DUNCAN J.—The bill of exceptions exhibits a clear and distinct view of the several questions of law raised on the trial of this cause, on five points. The opinion of the Court was requested by the plaintiff in error. The questions were distinctly answered by the Court, and it is to these answers he now excepts.

The first and second were matters of fact, and as such left properly to the jury; with the just observation, as to the second, that it was not necessary for the treasurer to make out a bill of particulars, if the party knows what the items are, and objects to them *in toto;* but if he demand such bill of particulars, the party must make it out, and deliver it, before he can sustain an action. The concluding section of the Act establishing a fee bill, is free from all obscurity. "It shall be lawful for any person to refuse payment to any officer, who will not make out a bill of particulars, as prescribed by the Act, signed by him if required; and also a receipt and discharge signed by him if the fees are paid." The requisition to furnish the bill must be made to justify the refusal. The request is not confined singly to the signing—the signature of the name of the officer; the signature is a component part of the bill. This provision was intended as a check on the officer. The bill and receipt, if the charges exceeded those allowed by the law, would furnish the fullest and most conclusive evidence, on a prosecution for extortion.

The third received a very satisfactory answer from the Court. The informality or irregularity complained of in the assessment, could not vitiate the sale. The 3d section of the Act of 13th *March*, 1815, under which the sales were made, declared it incompetent for the purchaser at the treasurer's sale to give in evidence any irregularity in the assessment or proceedings of the commissioner or treasurer. The actual assessment of the lands as unseated, was submitted to the jury as a fact to be decided by them from the evidence.

The fourth point respected separate deeds for each tract. The plaintiff in error contends, that one deed which he offered to prepare himself, would be in conformity to the

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law, and save him the expence of separate deeds; and that the refusal of the Sheriff was an act of oppression and extortion. Waving the question whether such deed of several tracts, assessed in the names of different persons, who for aught that appeared on the trial, were the real owners, would be valid, I cannot see how it affects the purchaser. It concerns not him, for the fees come not out of his pocket. All that he is bound to pay, is the amount of his bid. The taxes and costs, including the prothonotary's fees, he is to pay down, and the balance to give bonds for. The whole process from the return and assessment, to the sale and conveyance, are all of separate tracts. They are separate services on each tract. The acknowledgment must from its nature, be separate; the contract of sale, as separate and disconnected, as if the sales had been made to one hundred and five different persons. The several services performed by the treasurer, on the sale of each tract, are specified in the fee bill, and *for writing and signing every deed*, one dollar and fifty cents is allowed by law. The law contemplates the sale of each tract, as it in reality is, a separate transaction, for which there is a separate deed to be given. Will it be said that the prothonotary should enter the acknowledgment of a deed for 105 tracts, for one hundred cents. We are not to impute to the Legislature an act of such extreme imposition on this officer. A compensation so inadequate, contemptible and ridiculous, never could have been intended. As well might *Morris & Nicholson*, or the other large adventurers in original titles, the *Holland Company*, or *William Bingham*, have insisted on one patent issuing on 1,000 or 10,000 surveys of which they were the owners. In the mammoth survey, as it is called, in *Luzerne* county, though only one patent issued for many thousand acres, more than 12,000, yet the fees were the same as if distinct patents had been issued for each 400 acres; and this by the decree of this Court under a special Act of Assembly. *Shepherd and another* v. *The Commonwealth*, 1 *Serg. & Rawle*, 1. On these points the Court were prepared to decide at the last term, but on the fifth they entertained very serious doubts, and directed a re-argument on this point alone.

The Court of Common Pleas decided, on the ground, that a county treasurer was not included in the 8th article of

the Constitution of this Commonwealth, which provides, "that members of the General Assembly, and all officers executive and judicial, shall be bound by oath or affirmation, to support the Constitution of this Commonwealth, and to perform the duties of their respective offices with fidelity." This Court on the most deliberate consideration, have come to a different conclusion from the Court of Common Pleas. The difficulty was not so great on this, as on another question which at this term has been very fully discussed, that is, admitting the county treasurer to be bound by the Constitution to take this oath of office whether the action could not be supported by the county, taking him to be an officer *de facto* and not *de jure*. That a county treasurer invested with such great powers as he is by the laws of this State, having authority to sell the many millions of lands yet unseated, and whose sales after the expiration of two years, are irredeemable, and are at all times irreversible for any irregularity in the assessment or proceedings of the county commissioners or treasurers, should be exempt from the obligation which is required from the pettiest officer in a township, would be a most unaccountable omission. There can be nothing in reason to distinguish him from all other officers. Do the words of the Constitution include him, for if he is included by the Constitution, no law can absolve him, much less can he be absolved by any implication from the silence of the law. A commissioner's power is not so great; a Sheriff's power is not greater; both are limited to their proper county in the execution of their office; yet the law has declared, that every Sheriff and every commissioner before he enters on his office, shall beside the usual oath or affirmation of office required by the Constitution, take another and additional oath to make an impartial selection of persons for jurors, 4 sect. of Act of 29th *March*, 1805, directing the mode of selecting and returning jurors. *Purd.* 343. It may be difficult to define, with all just precision, what is a public office, and who is a public officer. Public offices have been defined to be a right to exercise a public employment and trust, and to take the fees and emoluments thereunto belonging. 2 *Bl.* 36. And as was stated by counsel in *Carth.* 478; and in *Leigh's Case*, 1 *Munf.* 475, the rule is, that where one man has to do with another man's affairs against his will, and without

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his leave, that is an office, and he who is in it an officer; and that to every public officer belongs duties to which the officer or his deputies only are competent, and which he is compellable to perform. The opinion of the Court is, that a county treasurer is an officer comprehended by the 8th article of the Constitution. There are many acts done by an officer *de facto*, which are valid. They are good as to strangers, and all those persons who are not bound to look further than that the person is in the actual exercise of the office, without investigating his title; but here the treasurer though not nominally, is really a party in this action. It is in part an action for his fees. It must now be considered that the question of taking the oath was directly before the Court, and that the Court directly decide, that though he did not take the oath required by the Constitution, he might recover in this action.

The sound distinction as I understand the law is, that the office *is void only as to himself*, if he has not taken this constitutional official oath, but not as to strangers. 2 *Lev.* 242. 4 *Com. Dig. franchise f.* 29. Acts done by persons who have not taken the oaths, are valid as to strangers, for otherwise not only those who no way infringe the law, but those whose benefit is intended to be advanced by it, might be suffering for others faults where they were no wise privy. 3 *Cruise.* 159; and in *England* an act is past regularly every year, to indemnify persons in office who have neglected to qualify themselves according to the Test Act.

In *The People* v. *Collins*, 7 *Johns.* 549, the Court decided, that where one comes to his office by colour of title, his acts are valid, when they concern the public or *the rights of third persons* who have an interest in the act done. Wherever the act done by an officer *de facto*, has been declared to be valid, it is where some third person claims an interest or title in the act done; and I have not been able after much research, to find any decision, where such act has been considered valid, in an action by the officer *de facto* claiming for an act done by himself. From the short note of the case referred to by the counsel of the defendant in error, of *Thurstan* v. *Slatford*, 1 *Lutw.* 377, in the note to *Fenwick* v. *Sears's administrators*, 1 *Cranch*, 268, I at first thought it would be found that the officer had taken the oath in the time pre-

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scribed, though the fees he demanded had accrued before he had taken the oath, or it might be, that the oath was not tendered; for it was resolved about that time that the office shall not be void for not taking the oath if it were not tendered, and the tender is traversable; and the Act of 13 *Car.* 2, says, he shall take the oath when required. But I have traced this case to *Salkeld's Reports*, 1 *Salk.* 234, which proves the very contrary of what it is stated to be in *Lutwyche*. It was a case in the Court of Common Pleas, in *assumpsit* for five pounds received to the plaintiff's use, being fees of the office of the clerk of the dean of *Oxfordshire*. On *non assumpsit* it was insisted on that the plaintiff had forfeited his office, by not qualifying himself according to law. They shewed he was admitted in *April*, and produced the record to prove he had not taken the oath. The plaintiff took a bill of exceptions; and on a writ of error in the King's Bench, it was decided to be evidence to be left to the jury. Judgment was afterwards given on another point. I do not place entire reliance on either of these reports; but *Salkeld* may justly claim equal rank as authority with *Lutwyche*. *Lutwyche* states it to have been decided in the Court of Exchequer, *Salkeld* in the Common Pleas, and taken by writ of error to the Court of King's Bench, and there the judgment of the Common Pleas on that point affirmed. There the action was for fees actually received, where the business was actually transacted; here the plaintiff in error resists the claim, and will not accept of the act done, because not done by a legal officer. This case is not satisfactory either way, and in forming my judgment I have dismissed it from my mind.

This distinction between one claiming to be the officer, and third persons, is recognised by the Supreme Court of *Massachusetts*, *Fowler* v. *Bebee and another*, 9 *Mass. Rep.* 231, where PARSONS C. J. in the strong and masculine language which distinguishes all his opinions, says, the claimant of office is no party to the record, nor can he be legally heard in the discussion of this plea, although our decision would as effectually decide on his title to the office as if he was a party. This would be judging a man unheard, contrary to natural equity and the policy of law. From considerations like these, has arisen the distinction between the

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holding of an office *de facto* and *de jure*. But if an action should be commenced against one claiming to be Sheriff, for an act which he does not justify but as Sheriff, or if an information should be filed, calling on such a one to shew cause, why he claimed to hold that office, in either case he would be a party, and the legality of his commission might come in question and meet a regular decision. If this be so, and I cannot imagine any fair answer that could be given to this course of reasoning, then, in this case, the person claiming to be treasurer is before the Court as a party, demanding fees for the exercise of an office, the exercise of which, was the subject of prosecution by the Commonwealth, and a disregard of the Constitution, the usurpation of an office and the assumption of a name and character which did not belong to him; for the oath of office cannot be considered as an idle, unmeaning ceremony. This oath is a condition annexed to every public office, the taking of which, is a prerequisite which cannot be dispensed with even by a Legislative Act, much less abolished by *a usage*, which is an abuse of the Constitution. Usage can only be considered where the construction is doubtful. The maxim that *communis error facit jus*, cannot be urged either as an excuse or justification of a violation of the plain letter of the Constitution. Of all usages this is the worst. And there is another maxim of the law which applies with all justice to this case, *malus usus abolendus est.* There can be no stronger obligation imposed on an officer than his oath of office, all human ties are comparatively weak. Had *Samuel Riddle* accepted these deeds, I will not say that they would not have conveyed him any title. There was a *Nisi Prius* decision, *Miller's Lessee* v. *Moore and another*, that the want of the proof of the names of the county commissioners being returned to the sessions by the clerk, and that they had taken the oath, would invalidate a sale for taxes. This decision was afterwards disapproved of by other Judges at *Nisi Prius. Lessee of Blair* v. *Caldwell*, 3 *Yeates*, 284. And thus the matter rests between these opinions; but this I will say, that no prudent man would accept of such conveyance. It leaves a doubt on the title, which having discovered, he might justly say to the person claiming the purchase money, I will not pay it,

because you are not a legal officer, have no right to make a sale, receive the money, or execute a conveyance. It was not too late to make an objection on the trial.

The alleged defects in the declaration and statement, it is unnecessary minutely to consider. The verdict clearly cured them all. The statement may be rejected as surplusage or considered as a mere bill of particulars, and cannot vitiate the declaration, nor could it cure a defective title in the declaration. To proceed by statement and by declaration appears to me to be incongruous; the two modes will not amalgamate.

For these reasons, it is the opinion of the Court, that judgment should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

End of October Term, 1821.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

EASTERN DISTRICT, DECEMBER TERM, 1821.

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Philadelphia.

BEVAN *against* TAYLOR and another.

CASE STATED.

Monday, December 17.

THIS was an ejectment for a house and lot in *Germantown*, brought by *Davis Bevan* against *Samuel Taylor* and *Mary Rainey*, in which the following case was stated for the opinion of the Court.

William Forbes and *Mary Bevan*, were married and had issue one child, *Nathaniel Forbes*. During the marriage, *William Forbes* acquired a considerable real estate, in the city of *Philadelphia*, in *Germantown* and elsewhere, including the premises in question, and died intestate, in the year 1801, leaving his widow, the said *Mary*, and his son the said *Nathaniel*, an infant, surviving, to whom the estate descended according to law, subject to the widow's third.

In the year 1805, *Nathaniel Forbes* died without having claimed the real estate, and intestate, leaving *Mary* his mother surviving, but leaving neither widow nor lawful issue, nor father, nor brother, or sister of the whole or half blood or their representatives.

Under the intestate laws of Pennsylvania, if a man die intestate, leaving neither widow nor lawful issue, nor father brother nor sister, but leaving a mother, real estate acquired by his father, and descending to him, goes to the relations on the part of the father, in exclusion of the relations on the part of the mother, in equal degree.

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At the time of his death, *Nathaniel Forbes* left the following relations on the paternal side, namely, *Samuel Taylor* and *Mary Rainey*, the defendants, who were children of *Elizabeth Taylor*, the sister of his father *William Forbes; William F. Taylor*, brother of the said *Samuel* and *Mary*, since deceased, having devised all his real estate to *Samuel* and *Mary*.

On the maternal side, *Nathaniel Forbes* left *Davis Bevan*, the plaintiff, the brother of his mother, and *Charles Pearson*, *Benjamin Pearson*, *Thomas Pearson*, *Bevan Pearson*, and *Anna Bevan Garrett*, children of *Ann Pearson*, the sister of his mother, and *Tacy B. Rodgers*, the granddaughter of *Tacy Prior*, another sister of his mother.

Mary Forbes, the mother of *Nathaniel Forbes*, died on the 22d *February*, 1817.

The defendants are in possession; and the question is, whether the plaintiff is entitled to any and what portion of the real estate of the said *Nathaniel Forbes*.

If the Court shall be of opinion, that he is entitled to any portion, judgment to be entered for so much: if on the contrary the Court shall be of opinion that he is not entitled to any part of the said real estate, judgment to be entered for the defendants.

This case was fully argued by *Sergeant* and *Binney*, for the plaintiff, who cited the different *Acts of Assembly* relative to the property of intestates. 7 *Cranch*, 461. 468. 4 *Dall.* 65. 2 *Binn.* 285, and relied on *Walker* v. *Smith*, 3 *Yeates*, 480, as expressly in point. For the defendants, it was argued, by *Chauncey* and *Rawle*, who referred to 2 *Black. Com.* 224. *Shippen* v. *Izard*, 1 *Serg. & Rawle*, 222. 4 *Dall.* 101. 2 *Dall.* 195. 1 *Dall.* 131. 265. 4 *Yeates*, 102.

The opinion of the Court was delivered by

DUNCAN J.—On this statement of facts, the question is, does the real estate of an intestate, coming on the part of his father, descend by the laws of *Pennsylvania* to his next of

kin on his father's side, or does it go to all the next of kin of equal degree to the intestate, whether paternal or maternal kindred, excluding the mother alone.

That the heir at common law takes, except in the cases enumerated in the several Acts directing the descent of intestate's estates, is a principle as firmly fixed as uniform decision can establish any doctrine of the law. It was settled by the undivided opinion of the Judges of the Court of Errors and Appeals, *Johnson* v. *Haines*, 4 *Dall.* 64, and has been followed in all subsequent decisions, particularly in *Cresoe* v. *Laidley*, 2 *Binn.* 279. The same rule has been applied in the construction of the Intestate Acts of the State of *Maryland*, by the Supreme Court of the *United States*, in *Barnitz's Lessee* v. *Casey*, 7 *Cranch*, 456. It would be dangerous to admit, that because the Legislature may have expressed an intention to form a scheme of descents, that Courts would supply an omission and bring every case within the specified classes. The enumerated classes are, *first*, Where the estate descends or comes on the part of the father or mother. *Second*, Ascents from child to parent. *Third*, Estates acquired by intestates, and which have not come on the part of father or mother. *Fourth*, Descents from brother to sister. *Fifth*, Where estates come on the part of father and mother, and where the intestate leaves neither father or mother, nor widow, nor lineal descendant, nor brother or sister of the whole or half blood, nor their representatives, in which case it is contended by the plaintiff, it will descend to, and be divided among, the next of kin of equal degree to the intestate, without relation to the ancestor from whom it came; and *sixth*, That where an intestate dies and leaves no widow or lawful issue, father, brother or sister, or their representatives, the estate shall be vested in fee simple in the mother, unless where such estate has descended from the part of his or her father, in which case, such part as may have so come, shall pass and be enjoyed *as if such person so dying seised, had survived his or her mother.* I do not find the same provision in a case of an intestate so dying, and seised of an estate coming on the part of the mother and leaving a father; but it is now unnecessary to decide whether this is a *casus omissus*, though at present I am inclined to think there is no provision that the estate shall go over as if the child had

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survived the father. It never vests in the father. It is pretty evident, that it never was the intention of the Legislature of 1794, that under the 12th section, the father living or dead, the maternal estate should depart from the maternal line, as it would, on the plaintiff's construction, in the case of a child leaving a paternal grandfather and a maternal uncle or aunt; and if the father survived the child, by the same construction it would pass by the father and vest in fee simple, in his father in exclusion of maternal uncles or aunts. A proposition difficult to digest. The plaintiff contends, that connecting the 5th section of the Act of 1797, which provides for this sixth class of cases, with the 12th section of the Act of 1794, providing that the real estate of any person dying intestate, leaving no widow, lineal descendant, brother or sister, or their representatives of the whole or half blood, shall descend to and be divided among the next of kin of equal degree to intestate, then the case falls within them, and the plaintiff is entitled as one of the next of kin of intestate. To form a new system of descent, will always be found an hard task. Human wisdom is inadequate to striking out at one heat a perfect one, without flaw. It is impossible to foresee all the consequences of an attempt so important, extensive and ramified. All the consequences and appendages, cannot be provided for by the new rule. Omissions and imperfections as they are discovered, must be supplied and remedied by subsequent laws.

This case must be approached with all the weight of the authority of *Walker's administrators* v. *Smith*, 3 *Yeates*, 480; for did not this decision stand in the way, the Court would have found little difficulty in coming to the conclusion, that it was the manifest and declared intention of the Legislature to preserve the line of descent in the blood of the ancestor from whom the estate came, for ever and for ever. I cannot distinguish the cases. It would be disingenuous to attempt to get round or evade it. It was a contemporaneous decision, the first construction, and if it had been received and acted upon, if under it, estates have been enjoyed and transferred; became a rule of property by which the divisions of estates have been regulated and governed, it ought not now to be disturbed. But if it has passed unnoticed until the publication of Mr. Justice *Yeates's Reports*—if it presents but

the meagre skeleton of a case, with an instant decision, without any reason assigned but one, from which a different conclusion is palpable—if it be inconsistent with the whole canons of descent prescribed by the Legislature, and violates their plain and obvious intention, and is followed by the most contradictory, absurd, and unnatural consequences, then as it was not the determination of a Court of the last resort, I cannot consider this Court bound to follow against their own strong convictions. Strange indeed would be the doctrine, that an error or inadvertence once committed, must be persevered in. A Court is not bound to give the like judgment, which has been given by a former Court, unless they are of opinion the judgment was according to law. Acting otherwise would have this consequence, that because one man has been wronged by a judicial determination, therefore every man having a like case, is to be wronged also. *Vaugh.* 383. In *Kerlin's Lessee* v. *Bull*, 1 *Dall.* 175, C. J. M'KEAN very justly says, that where there has been a determination by two Judges of the Supreme Court, after debate, and a long acquiescence under it, there ought always to be paid great consideration to it, that the law may be certain; but in that case he seemed to accord with the decision, and to be governed in weighing its authority, by the information he received from the gentlemen of the bar in different parts of the State, that estates had been distributed agreeably to it; and as the construction there had prevailed and had been received as a rule of property, though some might not in their private judgment agree with it, were the matter to be newly resolved, he thought it but reasonable to acquiesce and determine in the same way in so doubtful a case, to prevent greater mischiefs which might arise by shaking a number of estates, and from the uncertainty of the law. To all this I subscribe; and had I a doubt, or did I believe that this decision had been acted upon generally in the division of estates, I would let it rest. Far, very far from me be the desire to unsettle the rules and landmarks of property on my own speculative opinions as to how they ought originally to have been settled. I am not so presumptuous, as to set up as a reformer of the law. It is my humble endeavour, to ascertain as far as I am able, what the law is, and my pride and comfort, because it is my duty to walk in the ways, *quæ relicta sunt et*

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tradita; and if an error has been established, and taken root, on which any rule of property depends, it ought to be adhered to, until the Legislature think proper to alter it, lest the determination should have a retrospect,-and shake many titles which had been settled. It is not like rules of practice, which may be altered without danger, but rules of property ought not to be changed with every change of Judges. But this decision is a solitary and unnoticed one—one reason only given. "Viewing," says the Court, "this case in the strongest light for the appellants, we cannot go further than to say, it was a *casus omissus*, and then the well known remark as to a last will and testament, would be applicable to this, *voluit sed non dixit.*" This was all they did say; and for the case of the appellants, they had no occasion to say any thing further; for if it was a *casus omissus*, then, according to all the authorities, the heir at common law took. I have searched the papers of the learned and venerable reporter, in hopes of finding some more detailed opinion, but can find nothing but what is stated in the report. One would suppose from the reason, the Court was about to pronounce a decree of reversal. The mind is not prepared for the conclusion. It imports a different result. The case is a *casus omissus*, therefore it is to follow, that the heir at common law shall take. It seems not; but because it is not provided for, is it to be taken from him. And why is it to be taken from him? Because the Legislature have not taken it from him, *voluit sed non dixit.* But this not so; they have spoken, they have taken it from him, or divided it between him and others; and the only question is, to whom have they given it? There must be in this report some mistake, in the reason there certainly is. The accuracy of Judge YEATES was so distinguished, it is by me so much confided in, that I distrust my own judgment, and have sometimes thought, that I did not understand the case; and I must even now, after having pondered on it for more than a year, confess, that I cannot understand it. It is beyond my reason, to comprehend how from the Court's own premises, they draw the conclusion. One thing is very certain, as I shall presently shew, that Judge YEATES did not always continue of this opinion. But what was the cardinal design of the Legislature? To abolish the right of primo-

geniture, and the feudal doctrine that lands cannot ascend— to establish an equality of distribution without regard to sexes, always preserving the estate in that line of descent from which it came. When they pass beyond brothers and sisters of the whole blood, to brothers and sisters of the half blood, they must be of the blood of the ancestor from whom the estate came. So where it is to vest in a parent on the death of the child. And where they pass on to more remote kindred instead of one taking the whole, all having inheritable blood standing in equal degree to the intestate, take equally, unless in the case of an acquisition of the intestate, not coming on the part of father or mother, in which case it goes to all his next of kin. The ancestor is removed from our view. The intestate is the *præpositus*, and not the ancestor. Wherever the Legislature introduce another, the inheritable stock, where the estate comes from an ancestor in descents collateral, as well as in ascents to a parent, it is with a protestation, that it shall not go out of the line of the ancestor, as in the 6th section of the Act of 1794; if the intestate shall leave no issue, nor brothers or sisters, nor their representatives, the estate shall go to the father in fee simple, unless it has come on the part of the mother. So in the 5th and 7th sections; and so in the 5th section of the Act of 1797, under which the plaintiff claims. But if the 12th section of the Act of 1797, lets in all the next of kin, without regard to blood, the half blood will be let in equally with the whole; but this cannot be so; for the 7th section of the Act of 1797, declares, that on failure of brothers and sisters of the whole blood, the brothers and sisters of the half blood shall come in, except such estate of such as came from some one of his ancestors, in which case, (that is in every case where the estate so comes,) all who are not of the blood of such ancestor shall be excluded from such inheritance. So in the 11th section of the Act of 1794, brothers of half blood take in preference to remote kindred of the whole blood, unless where the estate come from an ancestor, in which case all who are not of the blood of such ancestor shall be excluded from the inheritance. Here the Legislature recognise in the case of more remote kindred than brothers and sisters, the preference to be given to the whole blood, and consider the blood of the ancestor from whom the estate came, as alone inhe-

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ritable. "In preference to the more remote kindred of the whole blood," is a declaration plain that only such blood can inherit; and that in descents to remote kindred, so far from losing sight of the blood of the ancestor, their right is acknowledged and preserved. If the exclusion is only applied to a case of an intestate leaving a brother of the half blood, and do not extend to more remote relations, this absurdity would follow, that if one died intestate, seised *ex parte paterna*, leaving a maternal brother, he would be excluded; but if he left only a maternal uncle, he could take, to the exclusion of more remote paternal relations. The position I maintain, is this, that taking into one view, the whole scheme of descent, under the Acts of 1794 and 1797, it was the intention of the Legislature in every grade of descent, to exclude from the inheritance all who were not of the blood of the ancestor from whom the estate came, and to preserve it in the line in which it came; in other words, that the ancestor is the *commune vinculum* whether the estate ascends or descends. The father may take on the death of his child to whom an estate was given by his father, because he is of the blood of that father. He will not take where the child takes from a maternal grandfather or grandmother, because he is not of their blood. The declaration in the 7th section of the Act of 1797, and 11th section of the Act of 1794, I incorporate into the whole system; for different statutes made at different times, are to be explanatory of, and construed into, each other, as in the construction of the Statute of Distribution, 22 and 23 *Car.* 2 *c.* 14, and statute 1 *Jac.* 2 *c.* 16. The proviso of the latter statute, that there shall be no representation beyond brothers, and sisters children, is incorporated into the first, on the rule that statutes in *pari materia*, shall be construed into each other. These statutes are said to be very incorrectly penned, and therefore the latter is to be construed according to the intention of the Legislature. *Stanley* v. *Stanley*, 1 *Atk.* 455. General words in one clause of a Statute, may be restrained by a subsequent clause; and there is no difference, whether the restraint be in a prior or subsequent clause; and it is consistent with the true construction of a statute to make a clause conform to other parts of the law, and its general system. We have a remarkable and apposite instance of this construction in

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Brown v. *Turberville*, 2 *Call.* 390, on the intestate Acts of *Virginia*, which provided, that if there be no issue, mother, brother or sister, or their descendants, and the estate shall not have been derived by purchase or descent from either father or mother, that it shall be divided into two moieties, one of which shall go to the paternal, and the other to the maternal kindred. The intestate was an adult, and the Legislature having omitted to confine it to the case of an infant intestate, although it was their apparent intention to refer it to the former part of the law which so confined it, the Court, in their construction, interposed the words *in case of an infant intestate*, so as to make this clause read, "and the real estate shall not in case of an infant intestate be derived from the father or mother." Sections are not considered as distinct enactments. Ancient statutes were without sections. All are parts of the same plan, and to be drawn together to come at their true meaning; if consistency and the sense of the thing require it. A general declaration in one section will run through all, and this is always done when absurd consequences would otherwise rise. Let us see how this will work. *Nathaniel Forbes*, taking from the father, is the proprietor, who dies without issue, brothers and sisters of the whole or half blood, or their legal representatives, leaving a mother and *Davis Bevan*, the plaintiff, the brother of his mother. The mother cannot take, but the brother can. If he had left a maternal grandfather or grandmother, they would have taken the whole in exclusion of the brothers and sisters (and their children) of the father, for they would be preferred, being nearer of kin, than uncle or aunt, and possibly they would take, though his mother could not. Our humanity is shocked by such distribution where the basis of the law is equality. Our understanding calls for some reason of policy, for this most unnatural preference; it may call in vain, for none such has been assigned, for none such exists. First, it is said in this remote degree, blood was entirely lost sight of, and its rights abolished. If this be so, then the half blood must be let in under the 12th section, although by the express terms of both acts they are excluded. Again, it is said, all are to be let in, because of the inconvenience of inquiry after many years, into the question of whom the estate came from. But this does not hold; for if

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there is a parent living, you must inquire into the fact, or the parent takes the whole.

It is not because nature points out this course, and the law makes the disposition which the intestate most probably would have done, had he made a will from natural affection; for the disposition is most unnatural, and we cannot suppose that the Legislature forgot, that of all human beings, the father and the mother were the dearest and the nearest next after a man's own children. But there is another reason assigned, and that is, that under the 12th section of the Act of 1794, the real and personal estate are to go together and to the same person, that as to the personal estate, there is no inquiry from whom it came, but if it was admitted as to the real, the estates would go differently and to different persons. This at first presents a difficulty; but on analysing it, it furnishes the strongest evidence, that when the Legislature used the term, next of kin as to personal estate, it included all the next of kin, under the Statutes of Distribution, unless otherwise expressed, but as applied to real estate, it meant only those of inheritable blood, as in the intestate Act of 1705, *Galloways' Ed.* 25, "if no children then to next of kin of intestate in equal degree," is in a subsequent section declared to mean heir at law. So in the same act, if an intestate dies without known kindred, the real estate shall escheat to his lord, and his goods to the proprietary. Known kindred is there construed according to the nature of the property, and differently as to real and personal estate; as to the first signifying next of kin of inheritable blood, capable of inheriting of the blood of him from whom the estate came; but as to personal kindred generally without relation to blood; for if it was not so, the land would not have escheated, if there was any kindred of the half blood—any who would be entitled under the Statutes of Distributions.

There are cases where the same words shall have different constructions, according to the nature of the property to which they are applied. As where lands and a chattel interest are devised to one, and if he die without leaving issue, then a devise over, the devisee has an estate tail in the land, leaving no issue being understood as an indefinite failure of issue; but as to chattel interests, they are construed as leaving no issue at the time of his death, and all laws are to be con-

strued according to the subject matter. The words, legal representatives, may be referrible either to heirs, executors, or administrators, according to the subject matter, and when they relate to lands, they are always considered as referring to heirs, *Duncan's Lessee* v. *Walker*, 1 *Yeates*, 213. And there is good reason for the difference in this case, the evidence of the titles, depending on written instruments, may be traced *ad infinitum*, but chattels being of a fluctuating nature, consisting often in the use, are incapable of being traced to their origin.

But, if the door were opened to all the next of kin, without relation to inheritable blood, what is to prevent an alien from taking (as an alien, under the 12th section of the Act of 1794, may take personal estate,) if the real and personal estate must go together. Here is a dilemma. An alien may be next of kin, and take personal estate, he may be nearest of kin, yet he cannot inherit real estate, and why cannot he inherit? For he is next of kin, and would be included by the words of the Act. Simply, because in him there is no inheritable blood. Where the Legislature exclude the mother, it is not an exclusion *nominatim*, a personal disability. When the Legislature excluded the mother they excluded all, who, in deducing title and pedigree, drew it from or through the mother, all on her part. Why is the half blood—even a brother excluded? Because the more remote blood of him from whom the estate came, is preferred before those in propinquity of blood of the intestate. Why is the mother excluded? Because not of the blood of the ancestor; not because she is not of the blood of the child, but because she is not of the blood of him from whom it came to the child. Why, in the name of common sense and common humanity, exclude the mother, and give to the grandmother. Why exclude the mother to let in remote kindred of her line? If the root cannot take, shall the branches?

I said the case of *Walker* v. *Smith* was an unnoticed case. It certainly would have been a leading case, where a question on which the doctrine came necessarily before the Court arose, yet, it never has been quoted by the counsel, never stated by the Court. In *Cresoe* v. *Laidley*, 2 *Binn.* 279, this provision in the 12th section was under consideration, its ope-

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ration on a paternal estate was fully and ably canvassed by the counsel concerned in this cause, and one of whom was in *Walker* v. *Smith*, and it was then contended, that this section had no relation to paternal estate, but was confined to estates purchased by the intestate. It is true, the Court decided it on the ground of *casus omissus*, the mother and a brother of the half blood living. Still, *Walker* v. *Smith* had a strong bearing on the question; yet it was unnoticed by the counsel, passed over in silence by the Court; and in *Harris* v. *Hayes*, 6 *Binn.* 422, it was again passed over in the Court's decision without notice.

I am then justified in saying it was still-born, buried in oblivion, until the publication of Judge *Yeates's Reports*. I have made inquiry in the country, of many gentlemen of the bar. Such a principle they had never heard of, until they found it in these reports, and I am entirely convinced, that by conforming to this decision, more titles would be disturbed, than by rejecting it.

But I said that Judge YEATES did not always continue of the same opinion, and it has relieved my mind of a great weight, to find that he has not done so; it lessens the heaviness of the duty and responsibility in deciding so important a principle of the law of descents—differently from the very learned and distinguished Judges who preceded us. For in *Shippen* v. *Izard*, 1 *Serg.* & *Rawle*, 226, we have the opinion of the Chief Justice and Judge YEATES; it is true, it was not the direct matter in judgment, but the minds of the Court were occupied by the different relations of mother and son. The whole law was considered. The Chief Justice says, "if the defendant's construction is not supported by the words of the law, still less is it so, by what we may suppose to be the spirit. It is reasonable that land which was devised to a son by his father's will, or suffered to descend to him, should continue in the line of the father, without the mother's taking any part of it, *for this is no more than the preserving it in the line, in which it was originally acquired, and that such was the intention of the Legislature, may be pretty clearly perceived from a view of the whole law.*" Coming from the father, is in this case, considered as coming in the line of the father. But still stronger is the observation of Judge YEATES, and in most direct op-

position to *Walker* v. *Smith*. "The Legislature had two objects in view, to abolish the feudal principle, that lands cannot lineally ascend, and that sisters shall inherit equally with their brothers, but *in this and other parts of the Act, sedulous attention is shewn, that the property shall not go out of the "line of the father or mother, who acquired it respectively.*" Such a principle is highly congenial to our own feelings in family arrangements, and operates powerfully as an incentive to honest industry; the bearing of the law is to be collected from all its parts taken in connection with each other." Here then, we have the direct opinions of the spirit, and whole view of the laws, taken in connection; if I had any doubts, these opinions would remove them; but I never did for a moment doubt, though I might have startled at *Walker* and *Smith;* coming upon me, as it did by surprise, it occasioned a pause. But, after the most anxious deliberation, to me, it is clear intention written in capital letters, in the Act of 1794, and the explanatory Act of 1797,—that all who are not of the blood of the ancestor, from whom the estate came, are excluded from the inheritance; however remote in degree the descent may be, the lines in which the estate came, are preserved *ad infinitum*, and the blood of the ancestor runs through every clause of these Acts; consequently that the plaintiff is not entitled, and judgment must be entered for the defendants.

TILGHMAN C. J. did not sit in this cause, being interested in the principle to be decided.

Judgment for the defendants.

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Wednesday, December 12.

LESLEY and others surviving executors of LESLEY *against* NONES.

A *scire facias* may issue upon a judgment though upwards of ten years old, without application to the Court, or affidavit.

The law does not positively presume payment of a judgment after nineteen years: that is a question for the jury.

A judgment was recovered in this Court, at *December* Term, 1799, by *Peter Lesley* against *Benjamin Nones*, the defendant. The plaintiffs issued a *scire facias post annum et diem*, on this judgment, to *December* Term, 1818. The defendant pleaded *nul tiel record*, and payment with leave, &c., and issues being joined, a verdict was taken by agreement for the plaintiff, subject to the opinion of the Court on the matters appearing on the record, it being admitted that the parties all lived in the city of *Philadelphia*.

Phillips, for the defendant, now contended, that no *scire facias* will lie on a judgment more than ten years old, without application to the Court, and affidavit that the debt is unpaid: and that after so great a lapse of time, the legal presumption is that the debt is paid. He cited 2 *Tid's Pract.* 1807. *Lansing* v. *Lyons*, 9 *Johns.* 84. *Hardisty* v. *Barny*, 2 *Salk.* 598.

BY THE COURT.—The cases cited from the *English* and *New York* reports, are founded on rules of Court, not on any principle of the common law. But we have no such rules, and therefore the common law must govern, which has fixed no time of limitation to the issuing of a *scire facias* on a judgment. As to the presumption of payment, that was a question for the jury. This Court cannot say, that after nineteen years, the law positively presumes payment of a judgment. On that point therefore, the defendant has no ground for a judgment in his favour. It is the opinion of the Court, that judgment should be entered for the plaintiffs.

Judgment for the plaintiffs.

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IN ERROR.

Monday, December 17.

ERROR to the Court of Common Pleas of *Montgomery* county.

A writ of error lies to the judgment of the Court of Common Pleas on the verdict of a jury rendered on appeal from an inquisition finding damages under the Act of March, 8th 1815, the proceedings on such appeal being according to the course of the common law.

Under the Act of 8th March, 1815, the mortgagor is the owner within the meaning of the Act so as to be entitled to sue for the damages for injury to the land: the mortgagees cannot interfere before judgment: though it seems, they might come in and claim afterwards, by motion to take the money out of Court.

In estimating the damages, the jury are to value the injury to the property at the time the injury was suffered, without reference to the person of the owner or the state of his business: and the measure of such damage is the difference between what the property would have sold for as affected by the injury, and what it would have brought unaffected by such injury.

This was originally a proceeding under the 10th and 11th sections of the Act of 8th *March*, 1815, entitled an Act to authorise the Governor to incorporate a company to make a lock navigation on the river *Schuylkill*, instituted by *John Thoburn*, the plaintiff below, against the *President*, *Managers and Company of the Schuylkill Navigation Company*. It commenced by the petition of the plaintiff to the Court below stating, that the petitioner was the owner of a certain tract of land, bounding on the river *Schuylkill*, containing seventy one acres or thereabouts, together with a certain cotton factory, and water works, erected on a certain stream called *Mill Creek*, near the mouth thereof, in the said county; and that the *President*, *Managers and Company of the Schuylkill Navigation Company*, had erected a dam upon the said river, so that the land of the petitioner, about ten acres thereof, had been inundated by the swelling of the water, in consequence of the erecting said dam, and the factory and water works of the petitioner were injured, by swelling the water into the tail race of said factory and water works, which had been erected on said *Mill Creek*, emptying into said river *Schuylkill*. That the petitioner had sustained very considerable damages therefrom. And that the said *President*, *Managers and Company* could not agree with the petitioner on the compensation to be paid for such injury, nor upon the appointment of suitable persons to ascertain the same. He thereupon prayed the Court to award a *venire*, directed to the Sheriff, to summon a jury of disinterested men, in order to ascertain and report to the Court what damage had been

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sustained by the petitioner, agreeably to the provisions of the said Act of Assembly.

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A *venire* was thereupon awarded by the Court with notice to the defendants, and a jury met, and reported the damages at 13,250 dollars. From this report the defendants appealed within the thirty days, allowed by the Act, and a statement was filed, setting forth the principal facts containing in the petition, and laying the damages at 19,000 dollars. The defendants pleaded, that they had not committed the damage complained of, and issue was joined, and the cause went to trial.

It appeared that the plaintiff was the owner of seventy-one acres of land in *Lower Merion* township, *Montgomery* county, of which ten acres were meadow. He had erected a cotton factory with machinery, on the land, at the mouth of *Mill Creek*, (which empties into the *Schuylkill*,) at a place where there had been originally a saw mill, and had there carried on the business of spinning cotton yarn. In consequence of the dam across the *Schuylkill* at *Flat Rock*, erected by the defendants in the year 1818, for the improvement of the navigation of the river, the water of the river was flowed back on the wheel and works of the plaintiff's factory, so as nearly to destroy the water power, and to oblige him to discontinue the business there altogether, and remove the machinery to another mill. The meadow was also in a great measure overflowed and its value deteriorated, and the machinery was injured. The property of the land and saw-mill, originally belonged to *Conrad Krickbaum* from whom it was purchased by the plaintiff *John Thoburn*, *James Thoburn* and *James Wood*, in *April*, 1814. In *April*, 1816, *James Thoburn* and *James Wood* conveyed their shares of the premises to the plaintiff. When the land was conveyed by *Krickbaum* to *John Thoburn*, *James Thoburn* and *James Wood*, they gave him a mortgage for 10,000 dollars, payable in ten equal annual instalments, with interest, of which, at the time of trial, 2000 dollars had been paid. In *June*, 1819, (after the commencement of these proceedings,) *John Thoburn* mortgaged the property to *John Stoddart*, to secure the payment of 5000 dollars, payable on demand; and this mortgage was assigned by *Stoddart*, in *October*, 1819, to the *Bank of Pennsylvania*.

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On the trial, the following points were made, and the opinion of the Court requested to the jury.

1. That the damages must be taken with reference to the value of the property, at the time when the injury was done.

2. That the injury done to his property, is the only injury the jury are to estimate, and not any injury which the Plaintiff has sustained in his business, by means of the dam of the defendants.

3. That the mortgage of the first of *April*, 1814, of *John Thoburn*, *James Thoburn*, and *James Wood*, to *Conrad Krickbaum*, for the payment of 10,000 dollars, in ten equal annual instalments, with interest, on which 2,000 dollars had been paid, and the mortgage of the 17th of *June*, 1819, of *John Thoburn* to *John Stoddart* for 5,000 dollars, payable on demand, were sufficient to prevent the plaintiff's recovery of damages; or that the interest of the morgagees should be deducted from the damages done to the property.

To the first question the Court answered and so instructed the jury, that though the plaintiff's property destroyed, may have cost him, when he purchased or erected the buildings damaged by the defendants' dam, double the value of them at the time of the injury to them, or destruction of them by the defendants, yet the value of them, so far as injured by the defendants at the time the injury was done, is the value of the injury sustained by the plaintiff, for which he is entitled to recover damages, be they more or less than the actual cost to the plaintiff. In other words, the damages must be assessed with reference to the value of the property, at the time the damage was done, and the jury, in estimating damages, must take into their consideration the advantages, if any, which may be derived to the plaintiff by the navigation.

To the second question the Court answered and instructed the jury, that if the plaintiff has been injured by means of any dam or dams erected by the defendants, or if the land of the plaintiff has been inundated by the swelling of the water, in consequence of the erecting of any dam or dams by the defendants; or any mill or other water work of the plaintiff, has been injured by swelling the water by the defendants into the tail race of any mill or other water works which may

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have been erected in said river, or on any stream of water entering into the same, he is entitled to damage for each and every injury which may have been so sustained or suffered by him, by means of such dam or dams.

The injury the plaintiff has actually sustained by means of the defendants' dam or dams, is to be the measure of your damages; but he can recover nothing, for fanciful or imaginary injuries, or for injuries done to his feelings. As, for instance, suppose the plaintiff had a valuable spring and spring-house, which rendered his farm more valuable, which had been overflowed and destroyed by the defendants' dam, he would be entitled to recover damages for the injury done thereby to them, and whole farm, if any, and nothing more. Suppose a handsome grove of trees had been destroyed by the defendants' dam, he would be entitled to recover damages for the actual value thereof, but could recover nothing in addition for the imaginary value he set upon it, because it was inestimably dear to him as having been planted by his deceased father, or because, in that grove, he had formed those tender attachments, which had united him to his partner for life.

To the third question the Court answered, that the mortgagees are not parties to this suit. There is no evidence of their having made any demands for damages, or set up any claims against the defendants for any injury done them, or either of them, by means of the dam. The mortgage to *John Stoddart* was given after this suit was instituted, and the damage complained of accrued. Under those circumstances, the Court think you should ascertain the damage the plaintiff has sustained, and no other, without any reference to the effect your verdict may produce on the mortgagees. What claims, or whether any, the mortgagees may hereafter make, to any portion of the damages you may find, if any the plaintiff has suffered, is not now a question to be taken into consideration by the jury.

To these instructions the defendant excepted.

The jury found a verdict for the plaintiff for 14,650 dollars, damages, on which judgment was entered.

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Kittera, for the defendant in error, now moved to quash the writ of error: contending that the proceedings were not the subject of a writ of error. The Act of the 8th of *March*, 1815, sec. 2, provides for an appeal by either party from the report of the jury, "in the same manner as appeals are allowed in other cases." This refers to the party's taking an oath, and entering into recognisance, as directed by the arbitration law of the 20th of *March*, 1810, sec. 4. *Purd. Dig.* 356. But the proceedings to obtain damages are not proceedings according to the course of the common law, but a special course by petition: and as the Act contemplates no farther proceedings, the jurisdiction of the Common Pleas, on the appeal, is final. Where an appellate jurisdiction is intended to be given to the Supreme Court, it is expressly given: as in the intestate Act of 19th of *April*, 1794, allowing an appeal from the Register's Court to the Supreme Court, in certain cases. *Purd. Dig.* 295. So the Act of the 27th of *March*, 1713, gives an appeal from the Orphans' Court to the Supreme Court. *Purd. Dig.* 463. The general rule is, that where a new jurisdiction is created, whose procedings are according to the common law, a writ of error lies: otherwise not. 2 *Bac. Ab.* 456. 3 *Mass. Rep.* 305. On a libel for a divorce, an appeal lies, and not a writ of error. *Miller* v. *Miller*, 3 *Binn.* 30. A writ of error does not lie to the judgment of the Quarter Sessions, upon an appeal by the supervisor of roads, from a summary conviction by a justice of the peace: and the reason given is, that it did not appear to be a proceding, according to the course of the common law. And yet, in this case, the trial in the Quarter Sessions was by a jury. *Ruhlman* v. *The Commonwealth*, 5 *Binn.* 24.

Broome and *J. Sergeant*, contra.

This Court will not look farther back than the procedings in the Common Pleas, and there they are according to the course of the common law. It is the same case with appeals from the awards of arbitrators, which, in the Common Pleas are carried on according to the course of the common law, and error lies. So on appeals from justices except in certain cases, such as concern roads, paupers, &c., where from the nature of the case, the procedings can not be according to the course of the common law: and these must be removed

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by *certiorari*. In the case of the *Ship Portland*, 2 *Serg.* & *Rawle*, 197, on an attachment against a vessel, a writ of error lay. So in an issue of *devisavit vel non*, directed by the Register's Court, error lies. *Vansant* v. *Boileau*. 1 *Binn*, 444. A writ of error lies from the judgment of the Common Pleas dismissing an appeal. *Commonwealth* v. *The Judges of the Common Pleas*. 3 *Binn*. 273. In a case that was decided at *Lancaster*, in *May*, 1818, *Moor* v. *Albright*, this question was, in effect, decided: for it was held by this Court, that proceedings in the Common Pleas, on an appeal from the Board of Property, are the subject of a writ of error.

Kittera, in reply.

The cases cited on the other side differ from this. In the case of the Ship *Portland*, the attachment act ordered a trial by jury. A feigned issue to try a will, is, in form, an action at common law. In *Moor* v. *Albright*, the Act of Assembly authorised the Court to mould the proceedings as they pleased.

The Court, having heard the argument, directed the counsel to proceed in the argument on the merits: after which, their opinion would be given on the whole.

Broome and *J. Sergeant*, for the plaintiffs in error, now proceed to argue upon the errors assigned.

1. The plaintiff below was not the person entitled to compensation, because he had mortgaged the property: yet the Court charged, that the compensation was to be made to him. The Act gives the damages to the "owner or owners." The mortgagees should be considered the owners: the damages are the full value of the property: the whole water power was rendered useless. It was no longer a security to the mortgagees, who had the legal estate.

2. The Court gave no answer to the second point proposed by the defendants for their opinion: that is, they gave in substance no answer.

Kittera, contra.

This Act contains a provision, enabling the company to take the property of individuals, before they pay for it. The

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construction ought, on this account, to be liberal in favour of the owner. The objections, now made to the capacity of the plaintiff to recover, ought to have been taken advantage of, by pleading that all the owners had not joined in the petition.

It is objected,

1. That the mortgagor could not recover at all, or that the interest of the mortgagees should be deducted from the damages. If the mortgagees lay any claim, they ought to have come into Court, and alleged it. But, in truth, the mortgagees wish the proceedings to be confirmed, and are willing to enter a release on the record. The plaintiff could not compel the mortgagees to join: nor if they had, could the jury divide the damages; there can be but one valuation. But, after the finding of the jury, the fund is in the power of the Court, and they may order distribution to the parties entitled. There have been many proceedings in analogous cases, under the road laws, but when did the mortgagees ever become parties to such proceedings? It does not appear that the mortgagees will be injured.

2. The measure of the damages is objected to: and it is said, that the Court did not answer the question on that subject. But, we contend, that the Court have expressly answered it. They told the jury, they were to consider the injury actually sustained by the plaintiff, and that was the measure of damages. On this point, he cited *Vanhorne's Lessee* v. *Dorrance*, 2 *Dall.* 304.

Reply.

Our bill of rights and Constitution authorise the taking of private property for public use, making compensation. This navigation is an object of great public importance.

1. As to the rights of the mortgagees. There was due on *Krickbaum's* mortgage, 8000 dollars: on *Stoddart's* mortgage, (given after the damage sustained,) 5000 dollars. We contend, that these mortgagees ought to have been the petitioners, or, if not, that a deduction should have been made to the amount of their interest, in order to protect us from their claims. The proceeding under the Act brings the title into question, incidentally. No one, but the owner, has a right to

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the damages, and the defendants may shew, that the plaintiff is not the owner. Suppose there were a leaseholder, would he not be entitled to a portion of the damages, as owner to a certain extent? Suppose the whole value of the land, destroyed by the backwater, when the premises had been mortgaged to their full value, who would be the injured person? The mortgagee, after default, is the legal owner. He may support an ejectment, and have a writ of estrepement. The mortgagor has no equity till the debt is paid. As to the release, it is too late now for the mortgagees to offer a release.

2. The Court was requested to charge, that damages were not to be given on account of the plaintiff's loss of business; but they did not charge on that point. This was a point of great importance to the company, as evidence had been given of the profits of the plaintiff's business, or rather of the profits of cotton spinning in general, which, one witness (Mr. *Siddall*,) represented as being very considerable. By the illustration given by the President of the Court, they might consider every thing as matter of damages, except what was purely matter of fancy or feeling. Now the real damage was the diminution in the value of the property: the difference in its value occasioned by the dam: and this would be proved by the price it would bring. The particular value, to the individual who owned the property, is not the standard. We do not deny, that the injury to the machinery was a fair subject for the jury's consideration.

The opinion of the Court was delivered by

Gibson J.—The motion to quash the writ of error must be refused. The Act authorised an appeal to a common law jurisdiction; and where that is the case, if there be no particular mode of proceeding pointed out, the proceedings are understood to be according to the course of the common law. Here they are actually so. An issue of fact was formed, and submitted to a jury, who gave a verdict, on which judgment was rendered, and it is therefore impossible to say the proceedings are not the subject of a writ of error. The judgment of a Court of Common Pleas, on a *certiorari* to remove the proceedings of justices under the Landlord and Tenant Act, or the Act to give possession to purchasers at Sheriff's

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sale, may be reversed on error brought to the Supreme Court: yet the proceedings were not at first according to the common law. I proceed therefore to consider the errors assigned.

The first is an exception to the charge of the Court; who were requested to instruct the jury that the mortgage executed by the plaintiff below, together with *James Thoburn*, and *Wood*, to *Krickbaum*, (only part of which was paid,) and the mortgage, executed by the plaintiff alone, to *Stoddart*, and by the latter assigned to the *Bank of Pennsylvania*, precluded the plaintiff from recovering damages; or at most, only as far as the damages actually sustained, should exceed the amount due on these mortgages, which, it was contended, should be deducted and reserved to answer the claims of the mortgagees, who were to be considered as the legal, and to the amount of their interest, the equitable owners of the land. Formerly the law was so. The possession of the tenant in mortgage was viewed, at law, as that of a tenant at sufferance, with perhaps a slight shade or two of difference. I am not aware however that this view was ever entertained in *Pennsylvania*: unquestionably it has not been since the passing of the Act of 1705, which authorises the mortgagee to proceed, by *scire facias*, against the land and have it sold; but the mortgagor has, as in equity, been treated as the real owner to all intents, as respects third persons: and, even as to the mortgagee, the debt has been considered the principal, and the land only as a pledge, for which the mortgagor could maintain an ejectment on tender of what was due. This doctrine which, though not expressly established by decisions directly on the point, has been glanced at in *Wentz* v. *Dehaven*, 1 *Serg. & Rawle* 312, and the *Lessee of Simpson* v. *Ammons*, 1 *Binn.* 175, is not peculiar to *Pennsylvania*. In *New York*, where the jurisdiction of the Chancellor is as distinctly separated from that of the common law Courts as it is in *England*, the mortgagor is considered, for all purposes as to third persons, to be seised of the *legal estate*. In *Hitchcock* v. *Harrington*, 6 *Johns.* 290, C. J. KENT, delivering the opinion of the Court, says: "it is now the settled law in this Court, and the same principle has been recognised in the Court for the correction of Errors, that the mortgagor is to be deemed seised, notwithstanding the mort-

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gage, as to all persons except the mortgagee and his representatives. When his interest is not in question, the mortgagor before foreclosure, or entry under the mortgage, is considered, *at law, as the owner of the land.*" The same principle is more distinctly asserted in *Collins* v. *Torry*, 7 *Johns.* 277. *Sedgwick* v. *Hollenback*, *ib.* 376. *Runyan* v. *Mersereau*, 11 *Johns.* 534. *Stanard* v. *Eldridge*, 16 *Johns.* 254, and it may fairly be deduced from *Tabele* v. *Tabele*, 1 *Johns. Cha. Rep.* 45. Even in *England* it is not clear that the law is not held so at the present day. Here there was no interference of the mortgagees; but if there even had been, it could not have arrested the proceedings before judgment. Whatever claim (if any) they had to the damages, could be enforced only on motion to take the money out of Court.

The second error assigned depends on the construction to be put on the tenth section of the Act of the 8th of *March*, 1815, by which the *Schuylkill* Navigation Company was incorporated. The defendants requested the Court to direct the jury, that injury done to the *property* could alone be taken into consideration in estimating the damages, and not any injury that the plaintiff might have suffered in his *business*, in consequence of the dam, which was the subject of the action. The Court gave no opinion on the point raised by the distinction submitted; but repeated the substance of the section on which the question turns; and then instructed the jury that the intrinsic value of the damages, without reference to circumstances that might induce the plaintiff to estimate the amount of the injury sustained more highly than a stranger would think reasonable, was the standard by which they ought to be governed. If therefore the charge should, on the point submitted, have been in the defendants' favour, there is error. The tenth section provides: "That if any person shall be injured by means of any dam being erected as herein after mentioned, or the land of any person inundated by the swelling of the water in consequence of the erecting of any dam; or any mill or other water works injured by swelling the water into the tail race of any mill or other water works, which may have been erected on said river, or any stream of water emptying into the same, and if the President Managers and Company cannot agree with the

owner thereof, on the compensation to be paid for such injury, the same proceedings shall be had as is provided in the eleventh section of this Act." The section thus referred to directs the mode of redress by the appointment of men, or by an application to the Common Pleas of the proper county. The material inquiry is: *at what point of time* were the jury to estimate the damage as having been suffered? Indisputably, *at the time when the injury complained of, was complete;* which was the moment the dam was finished; or rather, when the obstruction, by swelling the water, permanently produced its most injurious consequences. The principle, that the extent of an injury at the time it is suffered, is to govern the compensation to be received, without regard to enhancement from subsequent circumstances, is familiar and applicable to all cases, which I at present recollect, where compensation is to be made in damages. In cases of eviction of a vendee for want of title in the vendor, the value of the land when it was conveyed, as ascertained by the price paid (which is the value affixed by the parties themselves,) is the measure of damages on a covenant of warranty. So in an action on a contract for the delivery, at a day specified, of goods purchased—the damages are to be estimated by the value of the article on the day of delivery, and are not to be affected by any adventitious rise of the market, between that and the day of bringing the suit. Now here the injury to be redressed was one done to the *realty;* but altogether unlike a nuisance, for the continuance of which repeated actions may be brought, in each of which, damages may be recovered for the time intervening between the inception of the preceding suit, and the impetration of the writ in the cause which is then tried. The compensation was to be prospective, as well as retrospective; but to be estimated with reference to the time when the injury was committed. It was in fact to be the price of a privilege to swell the water to a particular height for an indefinite time. Now this price was due the moment the privilege was entered upon, and the price could be ascertained; which was obviously the time when the obstruction was first completed. The jury were therefore to ascertain what was then due; and the amount clearly could not be enhanced, or in any way affected, by sub-

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sequent injuries, the *consequences* of the obstruction. How far the omitting to instruct the jury to this effect may have operated on the amount of the compensation assessed, I am unable to say, as the bills of exceptions contain no more of the evidence than is absolutely necessary to an understanding of the points submitted; but as the particular injury to the plaintiff, in his business as a manufacturer, was necessarily subsequent to the erection, and as the defendant prayed the direction of the Court on the legal effect of the evidence relating to that part of the case, he was entitled to have it; for so far it would have operated in his favour. The tenth section of the ninth article of the Constitution declares, that no man's property shall be taken or applied to public use, "without the consent of his representatives, and without *just* compensation being made:" but to let in considerations that are only collateral to the assuming of the rights of the citizen, would, in this instance, carry the principle of compensation, even beyond the constitutional injunction. It is evident that the profit, in any branch of manufactures, must mainly depend on the amount of capital invested, the number of workmen employed, and the extent of the business carried on; but it would be plainly unjust to put it in the power of the plaintiff, by an increase of all these, to an amount beyond what the demand for the manufactured article would justify, to charge the defendant in the same proportion for the injury sustained by the impeding of his works in his business thus extended, as for a loss in his ordinary mode of carrying it on: that would make the defendant an insurer of ordinary profits in a new state of the business, pushed to a morbid extent, and would put it in the power of the plaintiff to increase the damages to any extent he might think proper. I mention this to shew the danger of taking into consideration circumstances posterior to the time when the privilege is fully entered on, and its consequences, to the individual to be compensated, are ascertained. The jury are to consider the matter just as if they were called on to value the injury at the moment when compensation could first be demanded: they are to value the injury to the *property*, without reference to the person of the owner, or the actual state of his business; and in doing that, the only safe rule is, to inquire what

would the property unaffected by the obstruction have sold for, at the time the injury was committed? what would it have sold for as affected by the injury? The difference is the true measure of compensation.

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Judgment reversed, and a *venire facias de novo* awarded.

The Commonwealth *against* GABLE and another.

Monday, December 17.

On an indictment for murder, a verdict of not guilty of murder, but guilty of manslaughter, is good, and is to be considered as a conviction of voluntary manslaughter.

One who is indicted of murder, cannot be convicted of involuntary manslaughter.

If on such indictment, the offence appear to be involuntary manslaughter, the defendant should be acquitted: yet he may be indicted for a misdemeanour.

Under the 8th sect. of the Act of 22d April, 1794, involuntary manslaughter must be prosecuted and punished as a misdemeanour.

AT a Court of Oyer and Terminer held by TILGHMAN C. J. and GIBSON J., for the city and county of *Philadelphia*, in *November*, 1821, *Joseph Gable*, *William Smith* and *Anthony Taylor*, were indicted for the murder of *Isaac Brasington*. *Taylor* was acquitted, and as to *Gable* and *Smith*, their verdict was delivered in the following words, "not guilty of murder, but guilty of manslaughter."

A motion was now made on behalf of *Gable* and *Smith*, in arrest of judgment.

P. A. Browne, in support of the motion, contended, that the verdict was incorrect, and would not warrant any judgment thereon, *first*, because it did not find the defendants guilty of a felony. *second*, because it did not ascertain whether the manslaughter were voluntary or involuntary.

The case was argued by *P. A. Browne*, for the defendants, and *Kittera*, for the Commonwealth.

TILGHMAN C. J.—*Joseph Gable*, *William Smith*, and *Anthony Taylor*, were indicted for the murder of *Isaac Brasington*. The jury acquitted *Taylor*, but as to *Gable* and *Smith*, their verdict was delivered in the following words, "not guilty of murder, but guilty of manslaughter." A motion has been made in arrest of judgment, in support of which two reasons have been assigned. 1st. That the verdict does not find the defendants guilty of a felony. 2. That the verdict is void, for uncertainty, because it does not as-

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certain whether the manslaughter was voluntary or involuntary.

1. There is not much weight in the first objection. The clerk makes a short minute of the finding of the jury, from which the record may be made up in form. The intention of the jury is sufficiently manifest, when they say that the defendant is guilty of manslaughter. Perhaps such a finding may not be strictly proper, after having found that the defendants were not guilty of murder, because manslaughter is included in murder. But this criticism is not now regarded, though formerly it was supposed to be entitled to some consideration in *England*. Even there, however, we find, from the 4th vol. of *Chitty on Criminal Law*, 642, that the common practice now is, to enter the verdict precisely as was done in the present instance; "*not guilty of murder, but guilty of manslaughter*." Our practice has been the same; and the reason by which it is justified, applies equally to both countries; *viz.* that the minute entered by the clerk, is a mere memorandum for his future guidance in making up the record, and sufficiently ascertains the meaning of the jury.

2. The second objection, considering the present state of the criminal law, in *Pennsylvania*, is of considerable importance, and must be thoroughly examined. It is founded on an Act of Assembly "for the better preventing of crimes, &c.," passed the 22d *April*, 1794. The great object of that Act, was, to mitigate the penal law, and with that view, it established four different grades of homicide; murder of the first, and second degree, and manslaughter voluntary, and involuntary. To each of these were affixed different punishments, and death was inflicted on murder of the first degree *only*. The form of indictment for murder, has not been changed in consequence of this change of the law. There was no necessity for any alteration, and indeed it seems to be supposed by the Act, that there would be none, because the jury are directed to ascertain by their verdict, "*whether it be murder of the first or second degree*." But with regard to manslaughter, the case is different. The jury are not directed to say, on a general indictment for manslaughter, whether it be voluntary or involuntary, but it is specially provided, that *involuntary* manslaughter may be indicted and

punished as *a misdemeanour*. By the 7th section of the Act, whoever shall be convicted of any *voluntary* manslaughter, shall be sentenced to undergo an imprisonment at hard labour, and solitary confinement, for any time not less than two nor more than ten years. And by the 8th section, "wheresoever any person shall be charged with *involuntary* manslaughter, happening in consequence of an unlawful act, *it shall and may be lawful* for the Attorney General, with the leave of the Court, to wave the felony, and to proceed against, and charge such person with a *misdemeanour*, and to give in evidence any act or acts of manslaughter, and such person, on conviction, shall be fined and imprisoned, as in cases of misdemeanour, or the Attorney General may charge both offences in the same indictment, in which case, the jury may acquit the party of the one, and find him guilty of the other charge." Thus we see, that involuntary manslaughter is converted into a misdemeanour, and punished accordingly. If that be the case, one who is indicted of murder, cannot be convicted of *involuntary* manslaughter, because it is well settled, that there cannot be a conviction of a *misdemeanour* on an indictment for *felony*. Therefore, when on an indictment for *murder*, the jury find that the defendant is guilty of *manslaughter*, it must be understood, such manslaughter as is felonious, which can be no other than *voluntary* manslaughter. That the law has been so considered by this Court, I shall shew hereafter, when I speak of the practice, as it appears by the records of the Court of Oyer and Terminer. But at present, I am considering the matter as if it were a new question. If *involuntary* manslaughter be no longer a felony, it could with no plausibility be contended, that these defendants could be convicted of that offence, on the present indictment. But it is asserted by the counsel for the defendants, that although the attorney general, with the leave of the Court, *may* proceed against involuntary manslaughter, as a misdemeanour, yet he is *not bound* to do so, but may still prosecute it as a felony, in which case, the person convicted of it, would be subject to the punishment prescribed in the 9th section of the Act of Assembly before mentioned. By that section, all claim to dispensation from punishment by *benefit of clergy* is abolished, and persons convicted of any felony before that time deemed clergyable, were made subject to an imprison-

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ment at hard labour and solitary confinement in the gaol and penitentiary house of *Philadelphia*, for any term not less than six months, and not more than two years, and to be treated and dealt with as is directed in the Act to reform the penal laws of this State; except in those cases where some other specific penalty is prescribed by the Act aforesaid, (to reform the penal laws of this State,) *or by the said Act, (for the better preventing of crimes &c.)* Now, as involuntary manslaughter was formerly a clergyable felony, it cannot be denied that it remained subject to punishment under the 9th section, unless it was changed into a misdemeanour, and made subject to fine and imprisonment as such, by the 8th section. But if it was so changed, it was not punishable under the 9th section. The question then will be, what is the true construction of the 8th section? Was it intended that *involuntary* manslaughter might be prosecuted, either as a felony, or a misdemeanour, at the pleasure of the attorney general, or that it should be prosecuted as a misdemeanour *only?* The expressions of the law are, that *it shall and may be lawful, for the attorney general, with the leave of the Court*, to wave the felony, &c. The Attorney General is not positively directed to wave the felony, but I apprehend that the nature of this clause is *imperative*. When it is said that he *may* wave the felony, it is intended that he *shall* wave it. This is not a new construction of the word may, and if there ever was a case in which that word ought to receive an imperative signification, it is the present. Involuntary manslaughter is not a great crime; in most cases, it rather deserves the name of misfortune; and it would be singular indeed, if it were to remain subject to *infamous* punishment, in a system avowedly introduced for the purpose of softening the rigour of the criminal law. And what would be still more singular, *involuntary* manslaughter, if considered as a clergyable felony, would be subject to a more disgraceful and oppressive imprisonment, though less in point of duration, than *voluntary* manslaughter, which is a much greater crime. In the year 1796, the State of *Virginia* made a law respecting murder and manslaughter, which appears to be a copy of ours. The substance of it will be found in 4 *Tucker's Blackstone*, 192, 193, *notes*; and there we have the opinion of Judge TUCKER, that by virtue of that law, involuntary

manslaughter was only a misdemeanour. The manner in which our Act of Assembly is drawn, shews that it was not intended any person should be convicted of involuntary manslaughter, unless the indictment charged him with it expressly. Murder is divided, into the first and second degree: yet the indictment is for *murder generally*, and the jury are directed to ascertain the degree; but there is no such direction as to voluntary and involuntary manslaughter. On the contrary, it is provided, that the defendant may be charged in the same indictment, both with voluntary and involuntary manslaughter, and the jury may acquit him of one, and find him guilty of the other. Now, if it had been intended that involuntary manslaughter might be prosecuted as a felony, at the discretion of the attorney general, it would have been more consistent, if in such case, the jury had been directed to ascertain by their verdict, whether the manslaughter was voluntary or involuntary, as they were to ascertain whether murder was of the first or second degree. If it be asked what is to be done, on an indictment for murder, if the evidence discloses a case of involuntary manslaughter, I answer, that the defendant should be acquitted. Nevertheless, he might afterwards be indicted for a misdemeanour. I have searched the records of all the Courts of Oyer and Terminer, held by the Judges of this Court, and by the Judges of the Court of Common Pleas, for the city and county of *Philadelphia*, since the making of the Act of *April*, 1794. I will not say, that practice, without debate, should be supported, where it was manifestly against law. Yet certainly in a case of doubtful construction, such practice would be entitled to great weight; for it cannot be supposed, that judgment would be given in *criminal* cases, under a *new system*, without consideration. The records which I have mentioned, shew, that in three instances, where the indictments were for murder, and verdicts "not guilty of murder, but guilty of manslaughter," the Judges of the Supreme Court passed judgment as directed by law, in cases of *voluntary* manslaughter. And three similar judgments appear to have been given, under similar circumstances, by the Judges of the Court of Common Pleas. But it does not appear, that in *any* instance, a verdict of *involuntary* manslaughter has been given on an indictment for *murder*,

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or on an indictment for *felonious manslaughter*. It has been made a question, in the argument of this case, what constituted manslaughter, within the meaning of the Act of Assembly? I do not know that the case before the Court requires an answer to that question, yet, as it has been raised, it may be proper to take some notice of it. Murder of the first and second degree, are defined by the Act; but no definition is given of voluntary or involuntary manslaughter; of course they are considered as crimes, whose nature was previously ascertained, and we are to seek for their definition in books of the best authority. There are some cases of voluntary manslaughter, where there was a *positive intent to kill*; one of these is where one finding a man in bed with his wife, in a transport of passion, puts the adulterer to death, with a sword or pistol. But I take it, that evidence of a positive intent to kill is not necessary, in order to constitute the crime of voluntary manslaughter. It is sufficient, if there be such acts of violence as may be expected to produce great bodily harm. On the contrary, involuntary manslaughter is where it plainly appears that neither death nor any great bodily harm was intended, but death is accidentally caused by some unlawful act, or an act not strictly lawful in itself, but done in an unlawful manner and without due caution. This doctrine is exemplified in the cases put, in 4 *Black.* 192, and 1 *Hale*, 472, 473; such as, where two men are playing at an unlawful game, and one of them, unintentionally kills the other; or, where a workman throws down a stone or piece of timber, into the street of a populous city, even though he calls out to give warning; or, where one is hunting in the park of another, without license, and his arrow, glancing from a tree, kills another. In all these cases, it is evident, that neither death, nor bodily harm of any kind were intended, yet the acts being either unlawful of themselves, or not done with sufficient caution, they are held to be cases of manslaughter. These principles, applied to the case of the defendants, who most undoubtedly intended very great bodily harm to the person who was killed, justified a verdict of voluntary manslaughter. Upon the whole, I am of opinion, that the verdict which has been recorded, is to be considered as a conviction of voluntary manslaughter, and that there is no cause for arresting the judgment.

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Gibson J.—I agree the verdict is good in form; but for reasons different from those of the rest of the Court—it is good as a conviction of *involuntary* manslaughter only. It seems to me, the Legislature intended, by the Act of 1794, to punish the offence of manslaughter generally, as a felony, theretofore clergyable; and at the same time, to distinguish the mild, as well as the more aggravated cases, as exceptions; and to annex to these a punishment, specifically graduated to the degree of their guilt; consequently, a conviction which does not bring the case within any of the exceptions, must be referred to that part of the Act, which provides for the crime at large. The Legislature intended to make the same distinction, as to degrees of guilt, in manslaughter, that they have indisputably made in murder, although not, as in the latter, by expressly distinguishing between the different degrees: and murder is always charged generally, without distinction as to the degree. The difference of degree, in either species of homicide, was marked by the Legislature, not to produce a change in the nature of the offence, and a correspondent alteration in the form of the indictment, but to indicate a difference as to the *quantum* of the punishment. Where the prisoner is convicted of murder, the degree of the offence is ascertained by the jury, whose duty it is to designate it in the verdict: and, although, when the Legislature come to distinguish between the different kinds of manslaughter, the same provision is not repeated, it must necessarily be understood to be implied: for, as there incontestibly is a difference in the degree of punishment, the degree of guilt must be ascertained, either by the form of the indictment, or by a special designation in the verdict. If by the former, there never could be a conviction of manslaughter on a count for murder, but only on a special count for manslaughter, and that, too, charging a particular degree of the offence. But the practice in every district of the State has uniformly been to sustain such a conviction. The truth is, that no alteration in the form of the indictment was intended in any case, except when the homicide should be prosecuted as a misdemeanour. The conclusion, therefore, is inevitable, that the jury must specify the degree of the offence, to authorise the Court to inflict the punishment for voluntary manslaughter; unless, indeed, *none but voluntary manslaughter*,

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can be punished as a felony: a position, which, with great deference to the opinion of my brethren, I think cannot be maintained. The Act authorises the Attorney General, where the prisoner is charged only with *involuntary* manslaughter, to wave the felony, by the leave of the Court, and proceed only for a misdemeanour; but suppose that he refuses, or the Court declines to permit him to wave the felony—and, if without leave, he goes for a misdemeanour, the Court may quash —and the prisoner is, as he must be, indicted for the felony, would he on conviction receive the punishment of *voluntary* manslaughter, or go entirely without punishment? The first is out of the question; for the Act is explicit in imposing an aggravated punishment on voluntary manslaughter, as a distinct and an aggravated species of the crime in contradistinction to involuntary manslaughter, which, it expressly defines to be that species which amounts to felonious slaying, only because it happens in consequence of an unlawful Act; and which, when prosecuted as a felony, constitutes the middle and general class of the offence, the highest and lowest being exceptions, and punishable as such. The Act obviously makes a distinction between them, as grades of crime, although the distinguishing features, by which either case is to be ascertained to belong to the one or the other, are not clearly described; but, of this hereafter. The distinction, between voluntary and involuntary manslaughter, is made in express terms. But, the latter is to be susceptible of farther distinction as to the nature of the punishment, at the discretion of the Attorney General and the Court, regard being had to the circumstances of aggravation and mitigation, that should appear in the case. Upon what is the discretion of the Attorney General and of the Court to be exercised? Not upon the question whether the offence charged be the voluntary or the involuntary species of the offence: the Legislature put the case of a manslaughter *conceded* to be involuntary, and where the prisoner is charged with nothing more. This certainly carries with it an assertion of a right to prosecute a prisoner so charged to conviction for the felony. But it may be asked, if on such conviction, the punishment for voluntary manslaughter cannot be inflicted, by what law can the prisoner be punished at all? The answer meets us at the threshold. The ninth section of the Act, after declaring that the benefit of clergy shall

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be abolished in all cases, provides "that any person convicted of any felony, heretofore clergyable, shall undergo an imprisonment at hard labour in the gaol and penitentiary of *Philadelphia* for any term, not less than six months, and not more than two years; except, when some specific penalty is prescribed by the Act aforesaid." Now manslaughter was a felony, theretofore, clergyable; and, I think it clear, that this is the section which provides for the punishment of the offence at large, the sixth section providing specifically for a particular and aggravated species. This conclusion is strengthened by considering that the *maximum* of the term of imprisonment, imposed by the ninth section on felonies formerly clergyable, is exactly the *minimum* of the term of imprisonment for voluntary manslaughter. From this, it seems the Legislature intended to establish a graduated scale of punishment, exactly adapted to the demerit of each particular offender. In the case at bar, the prisoners were indicted of murder, and were convicted of manslaughter generally, which is undoubtedly good; but the punishment ought to be inflicted under that section which provides for manslaughter as a general offence, and not under that, which provides for a particular species of it. If, from necessity, we are bound to consider a general conviction, as a conviction of the worst species, what sentence should we have had to pass, if the jury had found the prisoners guilty of involuntary manslaughter, in express terms? We certainly could not have inflicted the more aggravated punishment; and if not, under what other section than that which speaks of clergyable felonies, could we have sentenced them? In fact, all the provisions of the Act—which is remarkably well penned—perfectly accord with each other. If the Attorney General should think the case attended with sufficient circumstances of mitigation, he may, with the leave of the Court, indict for a misdemeanour. On the other hand, if he thinks the offence amounts to voluntary manslaughter or something worse, he may indict either for murder, or manslaughter generally, or both; or, if he has doubts, whether the prisoner should be punished for a felony or a misdemeanour, he may add a count for the latter to a count for manslaughter or murder: thus leaving the field of inquiry entirely open to the jury, and putting it in their power, accordingly as the proof may turn out, to con-

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vict of murder of the first or second degree: of manslaughter of the more aggravated species; of the offence generally; or of the mildest species of all under the form of a misdemeanour. But the degree of the general offence must be indicated by the verdict, that it may receive its appropriate punishment. I see nothing to alarm us, in this discretionary power of the Attorney General, as it can never be exercised, except in mitigation of punishment, and is therefore merciful in its operation. On the other hand, it can never be abused in skreening from due punishment, as it can be exercised only with the consent of the Court. But subject to the restriction contained in the Act, that officer, undoubtedly, has it, let the consequences be as they may. In construing a statute, I have no objection, that "*may*" shall be taken to mean "*shall*," where it incontrovertibly appears the word was intended to be used in that sense; but here, there is an evident intention to vest a discretionary power somewhere. The power to wave the felony is not to be exercised at all events: or else, why make the leave of the Court a requisite? It will not do to say the Court is bound to grant leave: it would be a useless and even a ridiculous ceremony to make it imperative on the Attorney General to apply for leave in every case, and on the Court to grant it in every case. Neither is it enough to say the Attorney General may go for a misdemeanour, without going through the form of an application to the Court. If the Legislature had meant that every involuntary manslaughter should be prosecuted as a misdemeanour, at all events they would have said so in terms, without having recourse to a circumvolution, which will not bear the interpretation contended for, without straining some of the words. But, there was good reason for making a distinction between different grades of guilt in involuntary manslaughter; and to shew it a hundred cases might be put. It cannot be supposed to have been intended, that a person, who, driving Jehu-like through the streets of a town, runs over, and kills a child, should be punished only for a *misdemeanour*, while the man, who, stung to madness by taunting allusions to circumstances of extreme delicacy, connected with his family or friends, (from which it is the happiness of few to be entirely exempt,) destroys life by a box on the ear, with the unarmed hand, is to be treated as a felon. Yet, such must be the

case, if the intermediate grade of the offence were not preserved; although, the first case put, is an instance of a diabolical crime, whilst the second is, in morals, scarcely a crime at all.

These distinctions are of no further value in the present inquiry, than as they serve to point out the precise section of the Act, within which the case of the prisoners falls. I am decisively of opinion, they ought not, as the verdict stands, to be sentenced on the section which relates to voluntary manslaughter, but on that, which declares the punishment of felonies formerly clergyable. The distinction between the grades of this kind of homicide has not, hitherto, being attended to; and I admit, there have been frequent instances of the more aggravated punishment, on conviction of the offence generally; but the practice has not been uniform. In a case particularly within my own knowledge, *The Commonwealth* v. *Graves and others*, who, a few years ago, were tried at *Carlisle*, for the murder of *Robert Grayson*, President HAMILTON, directed the jury, in case they should think the facts warranted it, to convict the prisoners specially of voluntary manslaughter, which they did, and the verdict was so recorded; his honour, intimating that the prisoners could not receive the more aggravated punishment, unless specially found guilty of the worst grade of the offence; and I am of opinion, many other cases of special conviction might be found in the records of the other judicial districts. Practice, to have effect, should at least be uniform and general; I apprehend, it should, in no event, have any, to establish a measure of punishment never sanctioned by the Legislature; particularly, where a change to the true construction, could operate only prospectively.

The particular circumstance, which distinguishes voluntary from involuntary manslaughter, is no where accurately defined. Were it not, that an attempt at classification had been made before the passing of the Act, I should be governed by analogies drawn from other parts of the Act itself, and should fix on the presence or absence of *an intention to slay*, as the criterion, rejecting *premeditation* and *deliberation* as circumstances that cannot exist in any kind of manslaughter, and which are therefore proper to distinguish only be-

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tween different degrees of murder. There are a variety of cases, where voluntary killing may not be murder, as where it ensues, without malice, from a furious state of the mind, induced by what the law esteems reasonable provocation, *Regina* v. *Naylor*, *Fost.* 272. *Stedman's Case*, 2 *Loft's Ev.* 736; or from resistance to a defective authority, even though the defect be unknown at the time. *Hugget's Case*, *Kel.* 59. *Regina* v. *Tooley*, 2 *L. Raym.* 1296. *Sir Henry Ferror's Case*, *Cro. Car.* 371. *et vide Curles' Case*, *Fost.* 135. & 4 *Bl. Com.* 192; or where the party is slain in defiling the prisoner's bed; and many other cases that might be put. With us, such cases would undoubtedly be punished as voluntary manslaughter; but the Act is by no means explicit, as to what shall constitute involuntary manslaughter, which is defined as "happening in consequence of an unlawful Act." But all manslaughter must necessarily so happen, as no person can commit it negatively by abstaining to act altogether, or in any way short of doing a positive and unlawful Act: this therefore leads to nothing. But a distinction like this, such as it is, was attempted before the passing of the Act; particularly by *Sir William Blackstone*, 4 *Com.* 191, who seems to think the matter depends on whether the unlawful Act were directed *against the person* of the party slain. Now it is obvious, this is without any foundation in reason; for a blow which deprives of life, may be perfectly voluntary on the part of the giver, without the death, which ensues, being a consequence either sought or intended; and in such case, the slaying can with no propriety be said to be voluntary. In *England*, where every kind of manslaughter was punished alike, the distinction was without practical consequences; and that may account, in this instance, for the crudity of a writer so clear and satisfactory in general. But, as there actually was an existing distinction at the passing of the Act, I am far from thinking the terms employed by the Legislature were not used in reference to it; or that we ought not to adopt it as far as it goes: but this ought to have no effect, by analogy, in murder, where, except in those cases in which the intention is excluded as an operative circumstance, the killing, to amount to murder of the first degree, must be *wilful*, *premeditated* and *voluntary*.

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DUNCAN J.—Crimes are divided into two denominations, felony and misdemeanour; misdemeanours include all indictable offences which do not amount to felony. On an indictment for murder, the jury may acquit the prisoner of murder and convict him of manslaughter; for all manslaughters are felonies at common law: voluntary continues so, under our penal code; and from my view of the subject, the only inquiry is, does involuntary manslaughter still remain a felony, or is its nature and punishment changed? Is it a misdemeanour punishable by fine and imprisonment, or a felony punishable by infamous infliction? No judgment for manslaughter would be good without charging it as felonious. The common law definitions of voluntary and involuntary manslaughter must be resorted to, the crime of voluntary manslaughter not being defined by the Act. We must look to the common law; there is no other criterion by which to distinguish the two branches of manslaughter. It is true, the Act describes involuntary manslaughter as happening in consequence of an unlawful Act; but still we must look to the common law for the definition of voluntary manslaughter. If, upon a sudden quarrel, two fight, and one of them, with a stroke not likely to kill, kills the other, this is voluntary manslaughter. So if one, on a slight provocation, strikes another, and unluckily, and against his will, kills him. But involuntary manslaughter happens in consequence of an unlawful act, without an intention to do personal injury to any one;—and no more was intended than a mere trespass.

The provision of the 8th section of the Act of 1794, as to indicting and trying for involuntary manslaughter, I consider imperative. The attorney general must take one of two courses, wave the felony with the leave of the Court, and proceed for a misdemeanour, or without leave of the Court may charge both offences in the same indictment, in which case the jury may acquit the party of the one, and find him guilty of the other charge. But the Legislature never could have intended to leave it either to the attorney general, or the Court to punish as a felony, that which they have declared to be a misdemeanour, and invest the Court with a descretion to sentence one committed of a misdemeanour to the cells for two years.

The word *may*, in statutes, is frequently construed as *shall*;

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as in the statute of *William* and *Mary*, for assigning breaches on bonds with collateral conditions, *may assign*, *may suggest*, being for the benefit of a party is compulsory, and the plaintiff can proceed in no other way. So in the statute 23 *H.* VI. which says that the Sheriff may take bond, this is construed he shall, and he is compellable to take it, 1 *Salk.* 609. How much stronger is the compulsion in a case so highly criminal, and where the difference is so very great, both in the crime and in the punishment.

Involuntary manslaughter is a distinct offence; it is not felony punishable by solitary confinement and hard labour, but misdemeanour punishable by fine and imprisonment; for if it is not this offence and thus punishable, it remains punishable as a clergyable offence, and is punished with greater ignominy than voluntary manslaughter; for in addition to pillory, confinement, and hard labour in all the offences which were before clergyable, and for which there is no specific punishment by the Act, the convict is to be treated and dealt with as the Act for the penal laws directs. Among other things, that Act directs shaving of the head, coarse food and clothing in coarse habits, and invests the keeper with a power to confine any of those malefactors who shall be idle or guilty of any trespass, in close durance, feed him on bread and water, and when he proves incorrigible put an iron yoke round his neck, and chains on his legs. Such was not the intention of the Legislature; they sank the offence from the high grade of felony to a misdemeanour; they punished it at the discretion of the Court with fine and imprisonment; discretion as to quantum of fine and duration of imprisonment. The object was to proportion the punishment to the nature of the offence, and to draw a marked line between the branches of manslaughter.

Voluntary manslaughter is, in the eye of reason, more criminal than involuntary. The offence is a high one, the punishment more severe, taking from involuntary manslaughter all ignominy of punishment. The *Virginia* Legislature have adopted *verbatim*, the provision under consideration, and Judge TUCKER in his notes to *Blackstone*, 4 *Bl.* 193, considers the provision as classing involuntary manslaughter in the rank of misdemeanour. The precedents with which we have been furnished, shew the offence of involuntary

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manslaughter to have been constantly indicted as misdemeanour. I do not speak of the indorsement, but the bodies of the indictments. Those for manslaughter, charge the killing to have been felonious, while in those for the involuntary, it is laid to be unlawful. The practice so long continued, shews at least the sense of the bar and of the Courts. I do not say, that this construction is binding in a case so highly criminal, yet it is evidence of the general opinion; but if it were erroneous, I would not punish this man, because other men had been unjustly or erroneously punished. But I think the practice right *ab ovo*, and that sentence for voluntary manslaughter follows on this conviction, for the following reasons, *first*, That on an indictment for murder, the party may be acquitted of the murder, and convicted of the manslaughter. *Second*, Because if it had appeared to the Judges who tried these men, that the facts only proved an involuntary manslaughter, they should have directed an acquittal, and the verdict ought now to be set aside; but this is not pretended. *Third*, For by the record it appears the jury have found the prisoners guilty of a felonious killing. *Fourth*, For that involuntary manslaughter is not a felony, but a misdemeanour, and that the prisoners being found guilty of a felony cannot be sentenced for a misdemeanour. In the scale of sound reason and substantial justice, the cases widely differ. The law looks with a jealous eye on every act which tends to bloodshed, and a disturbance of the peace —condemns the voluntary perpetrator of that act when attended with death, as a felon, although it punishes him not with the heaviest sentence, unless where it is perpetrated with the deliberate design to take life; but when death ensues in consequence of an unlawful act, not felonious, though the law considers the man far from innocent, it consigns him not to the cells, but measures the nature and degree of punishment, by the enormity of the offence, by the degree of real guilt. It entrusts no man and no Court, with the tyrannical power of punishing as a felony, that which it has declared a misdemeanour. Discretionary punishment as to its *quantum* in cases of misdemeanour, is wisely vested in the Courts: the degrees of guilt, and the shades and colours of the offences are so various. But it never vests in them any discretion as to its nature. This would be a tremendous power,

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and inconsistent with all our notions of a free government. Arbitrary punishment is the essence of every absolute and despotic government, while punishment prescribed by law, is the essence of every free and well regulated government; and every offence by our laws, has its certain punishment allotted. Misdemeanour is punished by fine and imprisonment, at the discretion of the Court, exercised on a just consideration of all the circumstances of aggravation or alleviation, except for those misdemeanours in their nature infamous, and for which infamous punishment was inflicted, before the act to amend the penal laws; for there the sentence is confinement at hard labour, not exceeding two years; the nature of the punishment not left to the Court's discretion, though the *quantum* is.

For the reasons given by the Chief Justice, to which I can add nothing, the objection to the verdict, grounded on its uncertainty, fails altogether.

On the 29th *December*, 1821, *Gable* produced the Governor's pardon, and was discharged.

Same day, judgment that *Smith* undergo an imprisonment for two years at hard labour, &c., in the penitentiary of *Philadelphia*, and give security for good behaviour for one year from the expiration of said two years, himself in 500 dollars, and two good sureties in 250 each, and pay the costs of prosecution, and stand committed till this judgment is complied with.

M'Dermot *against* Laurence.

Monday, December 17.

Point Reserved.

Real estate taken by partners on ground rent, and buildings erected thereon, for the purpose of carrying on glass-works, afterwards mortgaged by one partner without notice to the mortgagee of partnership debts then existing, is to be considered as between the mortgagee and the partnership creditors as real estate, and liable in the first instance, to the mortgagee.

THOMAS HARRISON, *Philip Jones*, *William M'Ilhenny*, and *John Encell*, purchased from *James Pemberton*, a lot of ground, for which they took a conveyance in fee

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simple as tenants in common, charged with a ground rent of 100 dollars a year, which was the only consideration paid to *Pemberton*. *Harrison* and the other three were partners in a glass-work, by the name of *Thomas Harrison & Co.* *M'Ilhenny* sold all his interest in this lot to *Robert C. Martin*, on the 27th *June*, 1808, subject to his proportion of the ground rent, and also subject to the said *M'Ilhenny's* proportion of the debts then due from the firm of *Thomas Harrison & Co.* On the 31st *December*, 1808, *Encell* released all his interest to *Harrison*, *Jones*, and *Martin*, in consequence of which the whole property was vested in these three persons. Buildings necessary for a glass-work were erected on the lot purchased of *Pemberton*, but it did not appear whether the expense of those buildings was paid out of the partnership stock, or by the parties individually. *Harrison & Co.* discontinued the business of glass-making in the year 1811, and rented the buildings, &c. to other persons. On the 24th *September*, 1816, *Martin* mortgaged his individual third of the premises to the plaintiff, for a private debt of his own, and the question was, whether the plaintiff could hold under this mortgage without being subject to the debts of *Harrison & Co.*, contracted subsequent to the 27th *June*, 1808, the date of *M'Ilhenny's* deed to *Martin*.

J. R. Ingersoll, for the plaintiff, agreed that the partnership debts up to the 27th *June*, 1808, had a preference, but contended, that the mortgagee took the one-third clear of all partnership debts, after that period. In relation to real estate, the general rule is, that partnership debts have no preference, over individual debts, and that the partners are tenants in common. The real estate of partners, descends to the heir of each, according to the rules of the common law. *Wats. on Part.* 72, 73. 81, 82. It does not survive like their personal property, nor is it liable in the first instance to partnership creditors. A purchaser or mortgagee of real estate looks to the record. He cited *Thompson* v. *Dixon*, 3 *Bro. Ch. Rep.* 198. *Balmain* v. *Shore*. 9 *Vez.* 500. *Taylor* v. *Field*, 4 *Vez.* 396. *Goodwin* v. *Richardson*, 11 *Mass. Rep.* 469. *Pitts* v. *Waugh*. 4 *Mass. Rep.* 424. *Ld. Craven* v. *Widows*, 2 *Ch. Cas.* 139. *M'Carty* v. *Emlen*, 2. *Dall.* 277, 2 *Yeates*, 190.

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Bradford and *Broom*, contra.

The object in purchasing this land was, to carry on the manufactory of glass in partnership, and it ought to be treated as personal property. The title papers showed a partnership, and the house was notoriously erected for partnership purposes before the plaintiff's mortgage. It is sufficient to raise an equity in our favour, that the plaintiff had notice of circumstances which ought to have put him on enquiry. 2 *Binn.* 466. 2 *Cruise's Dig.* 249, 250. In the present case, a separate creditor endeavours to take the partnership fund, which would place him in a better situation than the partners under whom he claims. It is a fraud, if a separate creditor in collusion with a partner, receives payment from the partnership funds, to the exclusion of partnership creditors. In bankruptcy the rule is, that joint property shall go to the joint creditors, and separate property to the separate creditors. Where the property is held and used for partnership purposes, there should be no distinction between real and personal estate, and in later times it has been so held, by the Court of Chancery in *England.* They cited *Luke* v. *Craddock*, 2 *P. Wms.* 158. *Foster* v. *Hale*, 3 *Vez.* 696. *Bell* v. *Phyn*, 7 *Vez.* 453. *Gilmore* v. *North America Land Company*, 1 *Pet.* 460. *Forde* v. *Herron*, 4 *Munf.* 316. *Wats. on Part.* 47, 75. 88. *Sugd. on Vend.* 438, 439. *Coop. B. L.* 229. *Lindon* v. *Gorham*, 1 *Gall.* 367.

J. R. Ingersoll, in reply.

Before the plaintiff received the mortgage, the manufacture of glass had ceased. *Prima facie*, real estate is not partnership property: to make it so, there must be an express agreement. The original deed makes no mention of partners. The deed from *M'Ilhenny*, refers only to debts then due: it conveys other things, such as fixtures, and by referring to debts then due, it in effect says, that it was not liable to debts afterwards to be contracted.

The opinion of the Court was delivered by

TILGHMAN C. J. [After stating the case.]—How far, land conveyed to partners, as tenants in common, shall be considered as partnership property, and whether it changes its nature and becomes personal estate, has been the subject of dis-

cussion in *England* and in some of the *United States of America*, but does not appear to have been decided by this Court. Land, except for the purpose of erecting necessary buildings, is not naturally an object of trade or commerce. Yet there is no doubt, that by the agreement of the partners, it may be brought into the stock, and considered as personal property, so far as concerns themselves, and their heirs and personal representatives. It was so decreed by Lord Eldon, in *Ripley* v. *Waterworth*, 7 *Ves. jr.* 424. But if a conveyance of land is taken to partners as tenants in common, without mention of any agreement to consider it as stock, and afterwards a stranger purchases from one of the partners, it would be unjust if without notice, he should be affected by any private agreement. It is very material, in the case before the Court, that the deed from *Pemberton* to *Harrison & Co.*, is a simple conveyance to them as tenants in common, and that no purchase money could have been paid out of the partnership fund, as the only consideration, was the ground rent of 100 dollars, for which each of the partners was responsible. Under such circumstances, I do not think that any case decided in *England* or *America*, goes so far as to make it subject to partnership debts, to the prejudice of a purchaser without notice. In the case of *Thompson* v. *Dixon*, (reported in 3 *Brown. Ch. Rep.* 198, by the name of *Thornton* v. *Dixon*,) where land, on which there were mills for partnership purposes, was held by the partners who were paper makers, as tenants in common, Lord Thurlow was at first of opinion, that after the dissolution of the partnership, this estate should be considered as personal property; but upon reflexion, he changed his mind, and decreed that it should retain its original nature, inasmuch as the partners had made no agreement sufficient to convert it into personal estate. This is a very strong case, as the mills were used in the partnership business. And on the authority of it, the master of the rolls, (Sir *William Grant*,) founded his decrees in the cases of *Bell* v. *Phyn*, 7 *Ves. Jun.* 453, and *Balmain* v. *Shore*, 9 *Ves. Jun.* 500. In *Bell* v. *Phyn*, partners living in *England*, purchased an estate in the island of *Granada*, and paid for it *out of the partnership stock*. Held, that it remained real property. In *Balmain* v. *Shore*, the partners were potters, and made use of the property in the

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course of their business, yet the master of the rolls decreed it to be real estate, and declared that after the case of *Thompson* v. *Dixon*, "*it was not a question which admitted of argument.*" Yet it is said, that Lord ELDON has been of a different opinion. In a note to the case of *Bell* v. *Phyn*, 7 *Ves. jr.* 453, (*American* Ed. *by M. Carey & Son*, with notes by *E. D. Ingraham*, Esq.,) it appears that in the case of *Selkrigg* v. *Davies*, (1 *Dowes P. C.* 231,) Lord ELDON said "his own individual opinion was, that all property involved in a partnership concern, ought to be considered as personal," and that he afterwards decided, in the case of *Townsend and others* v. *Deveines and others*, reported in the appendix to *Montague* on partnership 97, that real estate was to be considered as personal, where it was purchased, in whole, or in part, with partnership funds. I know of no other *English* cases which bear on this subject, and these were in disputes between the *heirs and personal representatives* of deceased partners. In the Supreme Court of *New York*, it was decided in the case of *Coles's administrators* v. *Coles*, (15 *Johns.* 159,) which was an action by the administrators of a deceased partner against the surviving partner, that a lot of ground and still-house, used for partnership purposes, the legal estate of which was vested in the partners as tenants in common, was to be considered, not as partnership property, but the separate property of the two partners. But I shall now advert to two *American* cases, where *creditors* were concerned. In *Goodwin* v. *Richardson*, (11 *Mass. Rep.* 469,) two partners took a mortgage of real estate to secure a partnership debt. They afterwards foreclosed the mortgage, and then one of the partners died, the partnership being insolvent. It was decided that the moiety of the deceased partner was to be considered as *his private real estate*; but I am not quite certain, whether the decision of this case might not have been in some degree influenced by a statute of *Massachusetts* respecting the payment of the debts of deceased persons. In *Forde* v. *Herron*, in the Supreme Court of Appeals in *Virginia*, (4 *Munf.* 316,) two partners took a conveyance of real property in fee, as tenants in common, which was paid for, in part at least, out of the *partnership funds*, but there was no evidence of any specific agreement that it should be considered as partnership stock. One of the part-

ners, who was indebted to the partnership, conveyed his moiety in security for a private debt of his own, and it was decided, that the other partner had no equitable lien on the property sold, because the purchaser had no notice of the transactions between the partners, but trusted to the title papers by which they appeared to be tenants in common. There is good sense in this decision and it bears strongly on the case before us. In the deed from *Pemberton* to *Harrison & Co.*, there is no trace of partnership, and although the defendant relies on the deed from *M'Ilhenny* to *Martin*, by which *Martin* took an undivided third part, subject to a third part of the debts *then due from the partnership*, that could be no notice to one who purchased from *Martin*, eight years afterwards, that the property was to be subject to *other debts subsequently contracted.* On the subject of notice, it is a circumstance of weight, that when the mortgage was executed to the plaintiff, the glass-works were not carried on by *Harrison & Co.*, but had been discontinued by them five years before; so that the plaintiff might well suppose, that the property was not then involved in any partnership transaction. This is a subject of very great importance, and I shall not commit myself by any general opinion on it. But certainly, where it is the intention of partners to bring real property into the common stock, it would be prudent to put their agreement on record, in order that purchasers may not be deceived. There is no decision which goes so far as to affect a mortgagee circumstanced like the plaintiff in this suit. Even Lord Eldon has not considered the property as personal, unless it was made so by the agreement of the partners, or purchased with their funds. I am therefore of opinion that the plaintiff is not to be subject to any partnership debts, which were not contracted before the 27th *June*, 1808.

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Friday, December 21.

In the case of Broad street road continued from Camac street to the township line road.

Under the 1st section of the Act of 3d April 1804, the whole twelve viewers must be sworn; if only ten of the twelve appointed by the Court are sworn, and proceed to act, their proceedings are irregular.

If twelve are appointed and sworn, two who do not view have a right to be present and give their opinions at the deliberations which afterwards take place.

THIS was a *certiorari* to the Court of Quarter Sessions of the county of *Philadelphia* to remove the proceedings in the case of *Broad* street road continued from *Camac* street to the township line road, to which the following exceptions were filed.

1. That the jury of viewers never were legally organised; only ten of the jurors met, and were sworn or affirmed, whereas twelve ought to have been sworn and affirmed.

2. That it does not appear that the jury were legally sworn or affirmed, nor by whom they were sworn and affirmed.

3. That it does not appear from the return of the jury, whether the street is necessary for a public or private street.

4. That it does not appear on the draft what course and distance the road or street is to take, nor is any reference had to the improvements either in the draft or report of the viewers through which the road may pass.

5. That the report is uncertain and void as it does not state from what part of *Camac* street the road shall commence, nor to what part of the township line road it shall be continued.

6. That the report of the viewers does not state that there is occasion for the continuance of the said street, nor that it is necessary.

7. That the Court confirmed the jury of view pending the order for a jury of review.

8. That the said road was approved, confirmed and ordered when it ought to have been disapproved, rejected and vacated.

The proceedings took place under the Act of 3d *April*, 1804, section 1, (*Purd. Dig.* 594,) which enacts that the Court of Quarter Sessions of the county of *Philadelphia*, on being petitioned to grant a view of, or for opening any public road, street, lane or alley within the township of the *Northern Liberties*, or the district of *Southwark*, shall have power,

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and by virtue of this Act are directed and required as often as they shall find it needful in open Court to order and appoint *twelve* discreet and reputable freeholders, neither of whom shall reside or own real estate in the township or district aforesaid, *who being first sworn* or *affirmed* shall together with the commissioners of the county for the time being, or a majority of them view the ground proposed for such road, street, lane or alley; and if they, *or any ten of them*, view the said ground, and any *seven* of the actual viewers, exclusive of the county commissioners, agree that there is occasion for such road, street, lane or alley, they shall proceed to lay out the same as agreeable to the desire of the petitioners as may be, &c.

Norris and *Delany* against the road, relinquished the third exception, and argued the remainder, but relied principally on the first; namely, that only ten of the jury attended and were sworn, whereas the law required that the whole twelve appointed should be qualified, though ten might view and seven report. The whole twelve should be qualified before any step can be taken. If the Court should appoint but ten, and they should be sworn, their acts would certainly not be good though seven should agree. The qualification of the whole can no more be dispensed with than the appointment of the whole. Besides it might lead to improper practices. The petitioners might leave out two who were averse to the road, if all the twelve were not sworn: whereas if they are all sworn the two who do not view have a right to join in the deliberations. The number seven is fixed on as the majority of twelve. They cited 5 *Binn.* 481.

Cohen and *Binney*, contra.

The expressions of the Act are ambiguous. Under the general road law of the 6th of *September*, 1802, *Purd. Dig.* 586, though six are appointed, it is sufficient, if five view, and four of the viewers agree. This Act of the 3d of *April*, 1804, is drawn on the same plan: if ten view and seven of them agree, it is sufficient: there is no positive direction that twelve shall be sworn or affirmed. The swearing is introductory to the viewing, and unnecessary for those who do not view. If one of the viewers appointed should die before

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the rest are sworn, they might proceed under the Act. The Act first directs that all twelve shall be sworn and view, and then proceeds to declare that if ten view, it shall be good.

The opinion of the Court was delivered by

TILGHMAN C. J.—This is the case of a road laid out by order of the Court of Quarter Sessions of *Philadelphia* county, under the Act of the 3d of *April*, 1804, entitled "a supplement to an Act, for laying out and keeping in repair," &c.

Several exceptions were taken to the proceedings, in neither of which, does the Court think, there is any weight, except in the *first*, *viz.* that only ten viewers appointed by the Court of Quarter Sessions were sworn. The Act directs, that on a petition for a road within the township of the *Northern Liberties*, "the Court shall appoint twelve discreet and reputable freeholders, neither of whom shall reside, or hold real estate in the township aforesaid, who, being first sworn or affirmed, shall, together with the commissioners of the county, for the time being, or a majority of them, view the ground proposed for such road, and if they *or any ten of them* view the said ground, and any seven of the actual viewers, exclusive of the county commissioners, agree that there is occasion for such road, they shall proceed to lay out the same." &c. The Counsel for the petitioners contend, that inasmuch as a road may be laid out, although, only ten persons appointed by the Court, actually view it, there is no occasion for more than *ten* to be sworn. But this does not follow. It is the plain intention and direction of the Act, that *twelve* persons shall be appointed and sworn, and it is the duty of all who are sworn to attend, and view the ground, unless prevented by some cause, which affords a reasonable ground for excuse. If the whole number need not be sworn, it may tend to improper practices—those who are supposed to be unfavourable to the road, may be prevailed on to decline the service. Besides, when all are sworn, although two of them may not be able to view the ground, yet they have a right to be present and give their opinion, at the deliberations which take place afterwards. And those opinions may have weight with the actual viewers. For there may be reasons as to the expediency of laying out a road, of which a man

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may form a judgment, without going on the ground. Besides, there is a convenience in having all twelve sworn, because, being sworn, they will think it their duty to attend the view, and then, in case of sickness or accident, there is a great probability of always having *ten* to go on with the business. Whereas, if ten only are sworn, and view, the sickness of a single person will put a stop to the whole proceedings. There is no good reason, therefore, for resorting to ingenious arguments, for introducing a practice contrary to the words of the law. It is better to take it, as it is written. Let the twelve persons be sworn, and then, whether they all attend the view, or only ten of them, the proceedings will be valid, provided seven of the viewers agree.

In this case, only ten having been sworn, it is the opinion of the Court that the proceedings should be quashed.

Proceedings quashed.

BUSSIER *against* PRAY.

CASE STATED.

Monday, December 24.

When the fees of a particular officer are mentioned in the fee bill of 1814, he can charge no other fees for any service whatever than those specified in the Act. But where the officer is not mentioned in the Act, he may receive fees under other Acts of Assembly.

THE plaintiff was inspector of salted provisions for the city, county, and port of *Philadelphia*, and brought this suit against the defendant, to recover certain fees for repacking salted beef; and the question submitted to the Court was, upon a case stated, whether the plaintiff, besides his fee for inspecting and branding, was entitled to a fee of one shilling for repacking, performed in the month of *November*, 1819.

T. Sergeant, for the plaintiff, relied on the provisions of the Acts of Assembly of the 18th of *August*, 1727, the 12th of *March*, 1789, the 20th of *April*, 1795, and the 28th of *March*, 1814, and referred to *Garigues* v. *Reynolds*, 6 *Binn.* 330.

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Binney, for the defendant, contended that the fee bill of the 28th of *March*, 1814, precluded the plaintiff's claim. It gives a fee of twelve and a half cents, for inspecting and branding, and prohibits any greater or other fees than are provided by the Act, (sect. 26.)

In reply, it was contended, that the latter part of the section only prohibited compensatory fees "for any services not specified in this Act, or some other Act of Assembly," and, therefore, the section did not apply to the plaintiff's claim, under the Acts of Assembly, then and still in existence unrepealed.

The opinion of the Court was delivered by

GIBSON J.—The 26th section of the Act of 1814, is decisive against the claim of the plaintiff. It directs, that if any officer shall take any other, or greater, fees, than is provided for; or shall take fees where the services shall not have been already rendered; or "shall charge or demand any fee other than those expressly provided for by *this Act*," such officer shall forfeit, &c.; and by the twenty-second section, the fees of the Inspector of salt provisions are thus designated; "*inspecting* and *branding* salt provisions for the port of *Philadelphia*, per barrel, *twelve and a half cents*." Whatever therefore, may have been the true construction of former laws, as to an additional allowance, for repacking and cooperage, the officer is now restricted to the very fees specified in the fee-bill, which is too explicit to be misunderstood, and too peremptory to be disregarded, It is, however, contended that although the last clause of the twenty-sixth section, prohibits illegal fees to be taken, yet it defines illegal fees to be such as are not specified in the Act in question, "or some other Act;" and hence it is inferred, that all fees theretofore expressly allowed, and not expressly prohibited by the Act in question, are still to be considered as demandable. But it is by no means clear, that that particular clause was not intended to have only a prospective operation, to narrow the prohibition, and to adapt it to the actual state of things, that would exist, in case the Legislature should afterwards increase any of the fees established by the Act in question, or

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create new ones where none were allowed before; although, I admit, that in that view it was unnecessary. But the true construction of the whole section is plainly this; where the fees of a particular officer are touched at all, by the Act of 1814, which meant to provide a complete fee-bill, it must be intended that the Legislature meant to designate with precision, the services, for which only, he should receive fees; and, therefore, that those fees are to be full compensation for all other services, incident to his office; but, on officers who are not noticed in the fee-bill at all, the Act is to operate no further, than to do away all pretence of a right to an equitable compensation, proportioned to the value of services for which no fees are expressly allowed in the fee-bill; but fees expressly allowed by other Acts, are still to be considered as demandable. But, the Legislature, in fact, profess by the fee-bill, to regulate the fees of the inspector of salt provisions, and, as they have not specifically provided for the services which are the subject of this action, judgment is rendered for the defendant.

Judgment for the defendant.

WALTON *against* SINGLETON.

IN ERROR.

Monday, December 24.

ERROR to the District Court for the city and county of *Philadelphia.*

To say of another "you got to bed with Sarah M." is actionable.

This was an action of slander brought by *Jesse Walton* against *William Singleton.* The declaration contained twelve counts. The jury gave a general verdict for 5,600 dollars damages, of which the plaintiff afterwards entered a *remittitur* for 2,600 dollars. The defendant moved in arrest of judgment and assigned the following reasons.

So are the words, "he is such a whoring fellow that it is with difficulty he can keep a girl about the house being continually a riding them."

So also are the words, "he (the plaintiff meaning) has committed fornication," notwithstanding the declaration avers that the plaintiff was, at the time of uttering the words, a married man.

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1. The declaration contains a count for uttering the following words which are not actionable, "you got to bed with *Sarah M'Gargle.*"

2. The declaration contains a count for uttering the following words and the same words are not actionable. "He is such a whoring fellow that it is with difficulty he can keep a girl about the house being continually a riding them."

3. The declaration sets forth, that the plaintiff, at the time of committing the several grievances set forth therein, was lawfully married to his present wife, and one count in the declaration sets forth, that the defendant uttered the following words, imputing a slander of the plaintiff, "He, the said *Jesse* meaning, has committed fornication," which words are not actionable.

4. The declaration contains adjective words, as having been uttered, imputing an offence to the plaintiff, which words are not actionable.

5. Some of the words laid in the declaration to have been uttered by the defendant, were actionable, and some were not actionable, and the jury having found a general verdict and entire damages, it is impossible to say how the jury apportioned the damages to the counts, and the defendant is therefore entitled to a *venire facias de novo.*

6. Evidence was given on the part of the plaintiff, applicable to all the counts in the declaration, and the jury gave entire damages; as some of the words laid in the declaration were not actionable, and other words were actionable, the damages cannot be apportioned, but apply as well to words which were not actionable as to those which were actionable.

The majority of the Court below thereupon arrested the judgment.

The case was argued by *P. A. Browne* and *J. R. Ingersoll*, for the plaintiff in error, and *D. P. Brown*, and *Chauncey*, for the defendant in error.

The opinion of the Court was delivered by

DUNCAN J.—The action was slander, set out in twelve

counts, verdict for the plaintiff on all the counts, and judgment arrested. 1821. *Philadelphia.*

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The counts objected to are those, in which it is stated,

1. That the plaintiff got to bed with *Sarah M'Gargle.*

2. He is such a whoring fellow, that it is with difficulty he can keep a girl about the house, being continually a riding them.

3. That he had committed fornication, meaning thereby, to charge him with being guilty of the crime of fornication, and it appearing in the declaration that he was a married man, the charge could not possibly be true.

Ancient precedents in actions for words, are of less authority than in any other case. There is a principle of common sense that now governs in their construction; it is, that words shall not be taken in the mildest sense, nor shall they be strained by any forced construction, beyond their natural meaning and common acceptation. Courts and juries will understand them in the same way other people would. We are not to examine dictionaries, nor turn to our law books to find out their legal technical meaning. The question is, what do these words import? There is no offence, the imputation of which can be conveyed in so many multiplied forms and figures, as that of incontinence. The charge is seldom made even by the most vulgar and obscene in broad and coarse language. Can any reasonable man doubt of the signification of these words, in any of these counts? Can it be seriously doubted, but that the defendant intended to defame the plaintiff, and charge him with unlawful sextual intercourse? Is this their meaning, or is it a foreign construction? If these words are not actionable, there is no security afforded by the law to reputation. The first stated, that *Walton* got to bed with *Sarah M'Gargle.* Now it is said, that he might have got to bed innocently with her, or he might have got to bed to her and left it *re infecta.* In one of the old cases, it was mooted, whether to say of a woman *I. S.* had the use of her body, was actionable, for he might have used it as a surgeon or physician. But this nonsense of the old cases is now done away, and the modern rule is such as I have stated it.

It is admitted, that if the words were, he was in bed with her, they would be actionable. The hearers would not be

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governed in the construction of them by such hair strokes, and it has puzzled me not a little, to find the difference, even on the nicest critical examination. To go to bed with, is to be in bed with. Indeed if there is a difference, the former contain a more direct charge than the latter; they are more frequently used to signify this intercourse. In all times, in every age, and by all writers sacred and profane, in the language of scripture, and in the language of the law, these words, except as between man and wife, significantly impute illicit intercourse, and with them it imports the rite of hallowed love. In the law it has the same meaning as a divorce from bed and board. There the divorce is not the suspension of the husband's right to go to the bed-side of his wife, but of the highest connubial right. He might visit her when sick in bed; but if he got to bed with her, this would *ipso facto* amount to a dissolution of the divorce, and the most perfect reconciliation. In cases of *crim. con.*, if the chambermaid swore that she saw the gentleman go *to bed to her mistress*, though she did not swear that he was in bed with her, a jury would not doubt of the *crim. con.* This set of words is clearly actionable—no other construction can be put on them than the jury have done.

The second set are objected to, because they are only adjective, imputing a disposition to whore, but not whoring; intention and abortive attempts, but not an act done; a whorish intention; and if this be so, there is much in the objection, and the Court were right in reversing the judgment. It is somewhere said, it is not worth while to be very learned in this kind of cases, yet we must be governed by the law, which certainly is, that mere intention, as mere lust, is not actionable. But to say of one he is a whoring fellow, is a charge of whoredom. The distinction is, between words merely adjective, as thievish, and participles as thieving; the latter are actionable, because they import an act done; the former are not, because they import only an intention. Murdering rogue, actionable, murderous quean not so. Thievish knave, not actionable, because they import only a corrupt inclination to theft. 4 *Co.* 19; but to call a man a thieving rogue is, because they import that a man has committed an act of theft. *Sid.* 373. But there is in 4 *Bac.* 501, a modern case, *Gardiner* v. *Atwater*, 29 *G.* II,

where this doctrine of adjective slander is put on its true ground. These words, *thou art a pitiful sheep-stealing fellow*, were on a motion in arrest of judgment, held actionable, because a charge of felony is thereby imputed; and *per curiam* the same nicety is not as heretofore observed, in construing words; for the rule now adhered to by all the Courts, is to understand them in their usual and obvious sense. The subsequent words do not efface the stain, but impress it more deeply on the character. He is a whoring fellow, and it is with difficulty he can keep a girl about the house, he is continually a riding them. This is making him out a whoring fellow indeed; he is so very bad, that in his own house, under the roof with his wife, he is continually riding the girls. Where words are a plain and direct slander, the subsequent words that should take off the force of the former, ought to carry a strong intention that they were not spoken in an actionable sense; for it is very unreasonable, that one should slander another by general words, and then mitigate them by words of a doubtful interpretation. *Alleyn*, 7. These words in the whole frame, are actionable.

The objection to the third set is, that being a married man, he could not commit fornication, which is but saying, the speaker mistook the legal name of the offence. It might be a good objection, if *Walton* were trying on an indictment for fornication. Our inquiry is of a different nature; did the words impute a crime? Fornication in its general use, signifies all kind of whoredom. Adultery is fornication of an aggravated nature. In many cases the action will lie, notwithstanding there is a repugnancy in the words themselves or made so by the matter apparent on the record; as if one say of a widow having children born in wedlock, she is a whore, and her children are bastards. Now though the children born in wedlock, cannot be properly bastards, yet they may be reported such. *Cro. Car.* 322. Thou wast foresworn in carpenter's hall, and robbed the hall, actionable, though properly speaking the hall could not be robbed. *Cro. El.* 788. So words spoken by a feme covert, you stole my faggots, (meaning the faggots of the defendant,) adjudged actionable, although it was objected that the defendant, a feme covert, could not have any faggots. *Palm.* 358. It would be a most shocking doctrine, and afford a cover for slander, if the slan-

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derer could escape by such a subterfuge; as if one should say, he committed flat burglary, I saw him go to bed to the wife of *A. B.* The cases of charging one with the murder of a man living, not being actionable, because impossible, were not much respected by Lord HOLT, who in such case observed, the fault is the greater, it is a double crime. *Comb.* 247.

The rule is now well established, that no inconsistency or want of grammatical propriety will prevent the words from being actionable, when the intention to charge the party with a crime clearly appears, and when a criminal charge is conveyed by the defendant's expression. The liability to make reparation, cannot be affected by any impropriety in the communication, whether legal or grammatical, when the loss of character, and its probable consequences, constitute the ground of action, though the act charged is in legal strictness impossible. See *Stark.* 78 to 80.

It is, therefore, the opinion of the Court, that the declaration contains no faulty count, and that judgment should have been entered for the plaintiff. The judgment of the District Court, is therefore reversed, and judgment for the plaintiff.

Judgment reversed, and judgment for the plaintiff.

The Commonwealth on the relation of WILLIAM HILL, President of the board of directors of the Public Schools of the seventh section of the First District of the State of Pennsylvania *against* The Controllers of the Public Schools of the said District.

December.

MANDAMUS.

Under the Acts for the education of the poor of the 1st district, the controllers have a right to refuse to draw an order for payment of a larger sum for the education of children in the 7th section, than is paid in the other sections of the district, though such sum be agreed to by the directors of such 7th district.

THE opinion of the Court was delivered by TILGHMAN C. J.—The President and board of directors of the 7th section of the 1st school district, have obtained a

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rule on the controllers of the public schools of the said 1st district, to shew cause, why a *mandamus* should not be issued, commanding them to draw orders on the county treasurer, in favour of *Solomon Humphreys*, for payment of thirteen dollars and twenty cents, being for tuition of poor children, and stationary furnished for their use. The cause shewn by the controllers against this rule, is, that the sums charged for tuition and stationary, are larger than they ought to be, and higher than are charged for the same services in other sections of the district. On the other hand, it is contended by the relators, that the controllers have no discretion, but are to draw orders for any sums, which they (the directors) may think proper.

The education of the poor, is an object which the people of *Pennsylvania* have always had much at heart. Great sums have been expended without producing all the good which was expected, and at length a particular system was formed for the city and county of *Philadelphia*, from which very beneficial consequences have already flowed, and more are anticipated. This system is comprehended in several Acts of Assembly, which must be considered and construed, as parts of the whole. As is usual in such cases, there are some obscurities, and perhaps some trifling inconsistencies, which it is the duty of the Court to reconcile, if possible. The different circumstances of different parts of the county of *Philadelphia*, which, (including the city,) forms the 1st district of this State, rendered it necessary to adopt different modes of education. In the city, the *Northern Liberties and Kensington*, *Southwark*, *Moyamensing*, *Passyunk and Penn* township, the population being great and dense, it was thought best to establish schools on *Lancaster's* principles. But, in other parts of the county, this plan would not suit, and the poor children were to be sent to such schools as could be found in the neighbourhood. The city and county were divided into sections. Directors for each section were to be chosen, and appointed in the manner prescribed by the law, and besides, there was to be a board of controllers, who were to have the general superintendance of the whole. The 7th section was composed of the townships of *Blockley* and *Kingsessing*, in which there are five directors, appointed by the Court of Quarter Sessions. This section having a popu-

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lation less compact than some of the others, was not calculated for *Lancaster's* system, and, therefore, the directors were to send such, as in their opinion came under the description of *poor*, to such schools as they might think proper, and in order to defray the necessary expenses, they were authorised by the Act of the 3d of *March*, 1818, to draw from the county funds, such sums as should be necessary, *in the same proportion as should be drawn by other sections, or school districts, for the like purpose.* This is all the restraint imposed on them, as to the *quantum* to be drawn, and a very useful restraint it was, as the public had suffered grievously, from the extravagant charges, as well as the negligence of schoolmasters. If it be asked, what is the meaning of the same proportion, it may be answered, that the directors of one section were not to go a greater average expense, for any given number of children, than was paid by the directors of the other sections in similar circumstances, that is to say, which were not under the system of *Lancaster*. The reduction of the expenses of education to the same average, throughout the district, is evidently the most advantageous and economical plan, and if persevered in by all the directors, there is little doubt that it will be accomplished. Indeed, it appears, that except in the 7th section, the thing is already done. If the matter had rested on the Act of the 3d of *March*, 1818, the controllers would have had nothing to do with it, for the directors of the 7th district would have drawn immediately on the county treasurer, and if they had over drawn, they might have been checked by the auditors. But by the Act of the 23d of *January*, 1821, it is made the duty of the directors of those sections, which have no schools on *Lancaster's* system, (and which, consequently, are not under the immediate care of the controllers,) "to examine the accounts of the expenses of their respective sections, and when the same are found to be correct, to certify and transmit them to the controllers, who shall draw their orders on the county treasurers, for the amount of the same, under the same regulations and restrictions, as other orders are drawn by the said controllers." This last clause, taken by itself, would seem imperative, and to take away all discretion from the controllers. But, it must be considered in conjunction with the Act of *March*, 1818, and being thus considered,

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it remains liable to the restraint imposed by that Act, *of drawing in the same proportion as other sections*; for there is nothing in the last Act, which intimates an intention to vary the rate of proportion which had been before established. This matter of drawing orders, is justly considered by the Legislature, of the first importance, and accordingly the controllers are made liable to a great penalty, by the 8th section of the Act of *March*, 1818, if they draw any order, *unless a majority of their whole number be present.* The question, then, is simply this—shall this Court compel the board of controllers to draw their order for payment of an account, which in their opinion is overcharged—an account which exceeds the proportion of expense incurred for the same services in other districts? I am of opinion that they ought not to be compelled. It is not at all surprising, however, that there should be a difference of opinion on this point, between the respectable gentlemen who compose this board of controllers, and the board of directors of the 7th section. There was something like an intimation, that the directors would resign, unless the law were decided in their favour. But I trust, they will think better of this. They are discharging a very useful office, so much the more honourable, as it is without reward. They have been selected for their good character, and the example of their withdrawing might have a bad effect. No doubt, their office is troublesome, and more so, from this little difficulty, which has been brought before the Court. I cannot help thinking, however, that it may be surmounted, when it is understood by the school-master in this district, that the directors are not permitted to pay them more than is charged in other sections. But after all, if it should be proved, that tuition cannot be had at a lower rate, it is in the power of the Legislature to give relief.

I am of opinion, that the controllers have shewn good cause against a *mandamus*, and therefore the rule should be discharged.

Rule discharged.

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December.

RITCHIE *against* HOLBROOKE.

A new trial will be granted if the verdict is for the plaintiff, and it appears by the affidavit of one of the jurors, that after the jury had received the charge of the Court, and retired to consider of their verdict, the foreman of the jury declared, that the plaintiff had satisfied him with regard to a difficulty in the plaintiff's account, in a conversation he had with him out of Court and after the jury had been sworn.

THIS cause was tried before DUNCAN J. at *Nisi Prius* in *November* last, and a verdict was found for the plaintiff.

The defendant now moved for a new trial, and the motion was argued by *C. J. Ingersoll* for the defendant, and *J. Sergeant*, for the plaintiff.

GIBSON J. absent, TILGHMAN C. J. delivered the opinion of the Court.

The verdict in this case having been for the plaintiff, a motion has been made on the part of the defendant for a new trial. In support of this motion, several matters have been offered both of law and fact, but there is one which demands particular attention. An affidavit has been produced, of one of the jurors, by which it appears, that a difficulty in the plaintiff's account, having been mentioned, after the jury had received the charge of the Court, and retired to consider of their verdict, the foreman of the jury declared, that the plaintiff had satisfied him, with regard to that difficulty, in a conversation which he had with him, *out of Court, and after the jury had been sworn.* The plaintiff's counsel contended, that the Court should pay no regard to this affidavit, because it is impolitic to permit jurors to relate what passed between themselves, and for this they relied on the case of *Cluggage* v. *Swan*, 4 *Binn.* 150. That was a very different case from the present. The jury drew lots for the verdict, and the Court refused to hear the affidavit of one of the jurors to prove it. Whether jurors should be permitted to disclose their own misconduct, has been a *vexata questio.* I declined giving any opinion on that point, in *Cluggage* v. *Swan*, because the case did not require it. There was enough to set aside the verdict, on other grounds. But my brethren, the late Judges YEATES and BRACKENRIDGE certainly were decidedly of opinion, that the affidavit of the juror should not be regarded. But it never has been, and I trust never will be doubted, that the affidavit of a juror shall not be received to prove

misbehaviour, of *one of the parties of the suit.* The holding of conversations with jurors after they are sworn, is a practice against which the Court should set its face resolutely, and put it down at once. It must be known, that a party may lose, but cannot gain, by a conversation with a juror after he is sworn, unless it be open, and by permission of the Court. If the verdict should be against him, it will stand; if for him, it will be set aside. It is objected, that this is hearsay evidence. To be sure, as to the fact of the foreman's conversing with the plaintiff, it is, in some sort, hearsay, because the juror who made the affidavit was not present at the conversation. But it is not hearsay, that the foreman informed his fellows of the explanation of the account which had been given by the plaintiff; nor is it hearsay, that at least one of the jurors, (the foreman,) declared himself satisfied, by evidence which was not given in open Court. But for my own part, where one of the parties is charged with a kind of misconduct which strikes at the root of trial by jury, and no attempt is made to contradict, or explain it, I am not for being very scrupulous in weighing the evidence. From what has been disclosed to the Court, I am satisfied in my conscience, that an improper communication took place between the plaintiff and the foreman of the jury; and therefore I am of opinion that the verdict should be set aside. Several important points of law were argued, but as the law may depend upon the evidence, and there is some reason to suppose, that the evidence on another trial may not be quite the same as on the last, it would be premature to give an opinion at present.

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New trial awarded.

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The Commonwealth *ex relatione* JOHN HUSTON and others *against* GEORGE JARRETT and others.

Wednesday, January 7.

RULE to shew cause why a *mandamus* should not be issued.

A minority of the persons in whom a trust of a school-house and school is vested by deed, cannot by associating and procuring a charter of incorporation under the Act of April, 1791, acquire the right to the management of them in opposition to the will of the majority of those interested.

This case was argued by *C. J. Ingersoll*, for the relators, and *Mahany*, for the defendants.

The opinion of the Court was delivered by

TILGHMAN C. J.—This case comes before us, on a rule on the defendants, *George Jarrett and others*, styling themselves "*Trustees of the Harmony school at Chesnuthill*," to shew cause, why a *mandamus* should not issue, commanding them to surrender the possession of the school-house, and the regulation of the school, to *John Huston and others*, elected trustees of the said school, under the charter of incorporation thereof.

From the evidence which has been produced, the facts of the case are as follows. On the 12th of *March*, in the year 1794, a certain *Weigard Miller*, conveyed to *Christopher Ottinger and others*, in fee simple, a lot of ground in *Germantown* township, on which a stone school-house had been erected, "in trust for the use of the neighbourhood in general, for an *English* protestant school, and for no other use or uses whatever." The school-house had been built, before this conveyance, by voluntary subscription of individuals in the neighbourhood; and by similar subscriptions an acre of adjoining ground was purchased from *Ann Miller*, in the year 1806, the legal estate of which was vested in trustees for the same use. It was the custom, for the neighbours to meet from time to time, and choose trustees for the superintendance of the school. Things went on in this manner, until last *January*, when some of the neighbourhood, thinking that the school had been mismanaged, and that its affairs might be better conducted by a corporation, proposed that an incorporation should be procured; but the proposition was negatived by a large majority, at a meeting regu-

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larly convened; and at the same time the majority elected the defendants trustees, in the usual manner. But the minority, not satisfied with these proceedings, formed an association, under the Act of *April*, 1791, by the name of "*The Harmony school association at Chesnuthill*," which was incorporated on the 20th *March*, 1821. Under that charter, the relators, *John Huston and others*, were chosen trustees, and they now claim the possession and the management of the school. It is provided by the 4th article of the charter, that its corporation shall hold "all and all manner of lands, tenements, rents, annuities, franchises and hereditaments, heretofore holden by the said association, or that shall be hereafter purchased by them."

It is difficult to perceive, from this state of facts, what pretension the relators can have, to take the possession and management of this school, from the defendants. It cannot seriously be contended, that a number of individuals forming a voluntary association, and obtaining a charter, under the Act of *April*, 1791, can by virtue of an article thrown into their charter, appropriate to the corporation, property which never belonged to the association. Nothing like this is to be found in the Act of Assembly. Now the property in question, never did belong to the association, (I speak not of the *legal* estate, but of the trust to which the legal estate was subject,) but to them, and many others who were opposed to the association. Nay, the opponents were the majority. And can it be supposed, for a moment, that the minority can thus defeat the wishes of the majority? It is very possible, that the school might be better managed by a body corporate. But it seems, those who are interested in it, do not think so. The trust is loosely expressed "*for the use of the neighbourhood*." It would have been better, if the manner of appointing trustees to manage the school, had been provided. Perhaps, if we had a Court of Chancery, something to cure that defect, might be done. But as we have no such Court, there is no authority, but the Legislature, which can interfere in such a case, and even if the Legislature should think proper to act, it would do nothing to alter the original trust, but only make such rules and regulations as might appear necessary for carrying that trust into effect.

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It is the opinion of the Court, that the defendants have shewn good cause against a *mandamus*, and therefore the rule should be discharged.

Rule discharged.

Da Costa *against* Guieu.

January.

Case Stated.

Where an assignment was made for the payment of accommodation notes subscribed or indorsed for the assignors, so as to exonerate the makers or indorsers of said notes from their liability, *held*, 1. That a bill drawn on the assignors for their accommodation, in favour of and indorsed by the drawer, and accepted and negociated by the assignors, is embraced within this description. 2. That the balance of accounts between the assignors and the drawers or indorsers of such paper is to be taken into consideration, and the remainder after deducting such balance, to be paid to the holders.

THIS cause came before the Court on a case stated. *John P. Garesché* and *Vital M. Garesché*, executed an assignment to the defendant, and a certain *M. Arnous*, deceased, of all their estate and effects, in trust for the payment of their debts, in the order and manner prescribed in the said assignment. After ordering the payment of certain preferred debts not material to the question before the Court, the assignment provided for the payment of other debts in the following words. "In the next place, they (the assignees) shall pay and satisfy all just demands against the grantors, for money lent by other persons than those above named, and pay and discharge *all accommodation notes subscribed or indorsed for them by other persons than those above named, so as to exonerate the makers or indorsers of the said notes, from their liability therefor.*" The plaintiff was the holder of a writing, drawn by *P. Bauduy* upon the assignors, and by them accepted, in the words and figures following. Dollars 2000. *Wilmington, March*, 28, 1818. Four months after date, please to pay to my order, without defalcation, twenty hundred dollars, *P. Bauduy*. *Messrs. J. P. & V. M. Garesché*, Merchants, *Philadelphia*. On the face of the instrument, was written "accepted." *J. P. & V. M. Garesché*. This instrument was drawn and indorsed by *P. Bauduy* for the accommodation of the assignors.

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Binney, for the plaintiff.

The spirit of the assignment is to prefer all who had made themselves liable for the accommodation of the assignors, and this would include the paper in question. The term note is used to signify a promissory note or a bill of exchange: and this is the case as well in legal language as in common parlance. In *Tassel* v. *Lewis*, 1 *Ld. Raym.* 743, a goldsmith's note is spoken of, which is in form a bill of exchange. In *Grant* v. *Vaughan*, 3 *Burr.* 1516, a bill directed, "pay to *Ship Fortune* or bearer," is spoken of as a note repeatedly, in the statement of the case, the arguments, and opinions of Lord MANSFIELD and the other Judges. In *Pearson* v. *Garret*, *Skinn.* 398, the words bill and note, are used convertibly in speaking of the same instrument which was strictly a note; and indeed as note may mean a promissory note or bill of exchange, bill may have the same meaning. In *Bull*'s *N. P.* 269, it is said, "merchants' notes are in nature of letters of credit passing between one correspondent and another in this form. Pray pay to *J. S.* or order such a sum, witness my hand. Now if the correspondent accept *this note*, he becomes chargeable in a special action on the custom." Besides, this instrument is not strictly speaking a bill of exchange, which is an instrument by which one orders another to pay money to a third: and to which there are three parties. This assignment was drawn for the accommodation of the assignors, and had no force till it was accepted. It thus became in effect a promissory note, drawn by the assignors in favour of *Bauduy* or order. The term without defalcation, is never introduced into a bill of exchange. It is a term peculiar to promissory notes, under the laws of *Pennsylvania*. The paper in question might have been declared on as a promissory note. A bill, says *Chitty*, (*on Bills*, 85,) may be drawn payable to the drawer himself: though in that case it is more in the nature of a promissory note. So it is held in *Shuttleworth* v. *Stevens*, 1 *Campb.* 407, that an instrument in form of a bill may be declared on as a bill or note. In *Butler* v. *Crisp's*, 1 *Salk.* 130. Lord HOLT says, if *A.* has money to lodge in *B.'s* hands, and would have a *negotiable note* for it, it is only saying thus: Mr. *B.* pay me or my order so much money value to yourself and signing this, and *B.* accepting it. Or he may make

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the *common note*, and say thus, for value to yourself pay me so much. But the great question is, did the parties mean to restrict the preference to a promissory note, formally such, or was it meant to embrace generally accommodation paper.

Keating and *Duponceau*, contra.

This is a mere question of construction of the assignment, and preferences in assignments are to be construed strictly. Terms used in instruments are to be understood in their common popular sense, unless they have acquired a technical meaning. 2 *Com. Cont.* 531. 1 *Pow. Cont.* 376. 407. 1 *Doug.* 277. The instrument here is strictly a bill of exchange, and its nature is not changed by being made payable to the drawer. Accommodation note is a well known expression, and never used in reference to a bill of exchange. The words "makers or indorsers of said notes," in the assignment are material to shew that promissory notes were meant, as the word maker applies to them only: in speaking of bills of exchange we use the term drawer. In the case before the Court there were promissory notes on which the preference might operate. It is true, that in bookkeeping bills payable and bills receivable, comprehend notes: but this is for convenience. In law and in proper speech, bills and notes are different, and the contracts are different. *England* did not receive the commercial law till long after it had been used in *Europe*, and that has occasioned some confusion in the elder books. But of late, the language of Courts and merchants has been more accurate. The word note is used in our Courts for promissory note. 1 *Binn.* 430, 432, 433. *Chitty* 24, uses bill to mean bill of exchange: and note for promissory note. Note formerly meant a memorandum, and was used extensively: but now it has a received signification, and is applied simply and exclusively to a promissory note, when employed in reference to negotiable paper.

Binney, in reply.

The main intent of the preference in this instrument was to secure those persons to whom the assignors were under honorary engagements: those who became responsible from

friendship only. The words makers or indorsers are relied on. This is a very critical remark. But why may not the drawer of a bill be called the maker? Besides the drawer of the bill was also the indorser.

The opinion of the Court was delivered by

TILGHMAN C. J.—The question is, whether it was an *accommodation note* within the meaning of the clause of the assignment before mentioned. It is contended by the defendant, that it was not, because nothing but *promissory notes* were intended to be provided for. If the provision had been for promissory notes, in express terms, the plaintiff would have had nothing to say, because he is not the holder of a promissory note. But the assignment does not mention promissory notes expressly. We must endeavour to ascertain therefore, what kind of paper was intended to be preferred, and whether the words of the assignment are sufficient to carry the intention into effect. The intent seems to have been, to indemnify those persons who had subscribed or indorsed negotiable paper, for the accommodation of the assignors. Since the expiration of the Bankrupt Law, this kind of preference has been very common, and has been deemed fair. That intent would embrace the paper held by the plaintiff, which was subscribed and indorsed by *Bauduy*, for the accommodation of the assignors. But it is objected by the defendant, that it was not within the words of the assignment, because it is not a *note*, but a *bill*. Without doubt it is a *bill*, but it does not follow, that it may not be also a *note*. I confess, I think it may be more accurately called a bill, than a note; but yet the authorities produced on the argument, shew that *note* has been considered as a general term, comprehending both bills and promissory notes. What were formerly called *goldsmith's notes*, were in form a *bill*, by which a person ordered his banker, to pay a sum of money to another, or sometimes the bearer, (see 1 *Ld. Raym.* 743. *Tassel* v. *Lewis.*) In the case of *Pearson* v. *Garrett*, *Skinn.* 398, *bill* and *note*, are used as synonymous terms. These, to be sure, are old cases, decided when commercial law had not made great progress, in *England*. But, to come to later times. In *Grant* v. *Vaughan*, Lord MANSFIELD repeatedly

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speaks of an instrument which was a *bill*, as a *note*. It was in these words. "Pay to *Ship Fortune* or bearer." 3 *Burr.* 1516. And in *Bull. N. P.* 7 *Ed.* 269, is the following passage. "Merchants *notes* are in nature of letters of credit passing between one correspondent and another, in this form. Pray pay to *I. S.* or order, such a sum; witness my hand, &c." This is great authority, to which I will add, that in strictness, when a promissory note is to be described, it is called a *promissory note*, and not simply, *a note*. This appears from the form of declaration on a promissory note, in which it is set forth, that the defendant made his certain note in writing called *a promissory note*. Considering then, that these assignors did not make use of the expression *promissory note*, it would be hard that the drawer of the paper in question should remain exposed to loss. He lent his name, for the accommodation of the assignors; his case falls within the spirit of the intended indemnification, and is therefore entitled to all the favour which can be lawfully shewn to it. I am of opinion, that the instrument held by the plaintiff is an *accommodation note*, within the meaning of the assignment, and therefore he is entitled to judgment upon the case stated.

Judgment for the plaintiff.

After the foregoing opinion was delivered, the following additional case was stated for the opinion of the Court.

The opinion of the Court is further requested upon this question, with reference to the former case stated; whether the plaintiff and those who like him, hold Mr. *Bauduy's* bills or notes, drawn or endorsed for the accommodation of *J. G. & V. M. Garesché*, the assignors, are, under the terms of the assignment, entitled to be paid out of the assigned estate, without regard to the state of the balance of accounts, and outstanding paper, existing between the said *Bauduy*, and the said *J. P. & V. M. Garesché*, at the time of the assignment, and so continuing to this day, or whether those balances or either of them are to be taken into consideration by the assignee in distributing the assets among this class of creditors.

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After argument, the opinion of the Court was delivered by

TILGHMAN C. J.—It was intended by the assignment of *Messrs. Garesché*, that the *subscribers* or *indorsers* of paper for their accommodation should be indemnified; but there was no intention to give a preference to the *holders* of such accommodation paper, although it might happen that such holders would obtain a preference, because the subscribers or indorsers could not be indemnified otherwise than by paying the whole debt. But, if the subscribers or indorsers, were indebted to *Messrs. Garesché*, on other accounts, they would be indemnified, by deducting the balance of those accounts, from the amount of the accommodation paper, and paying the remainder to the holders of the paper. It would be unjust, that this fund assigned by *Messrs. Garesché*, for the benefit of their creditors, in general, should more than indemnify their friends, who had lent their names for their accommodation; which would be the case, if the whole amount of the accommodation paper were paid, without regard to the balance of other accounts. It is the opinion of the Court therefore, that such balances should be taken into the calculation. As to accommodation paper which may have been issued by *Messrs. Garesché*, in exchange for other paper of like kind, on which their friends had become responsible for them, the Court can give no opinion until they are informed of all circumstance attending it.

GIBSON J.—Was absent at the argument and gave no opinion.

WILLING and wife and another *against* BROWN.

Monday, January 7.

PARTITION by *Thomas M. Willing* and *Jane* his wife, and *Henry Nixon* against *John H. Brown*, tried before DUNCAN J. at *Nisi Prius* in *November* last, and verdict for the plaintiffs. The defendant now moved for a new trial.

A person with whose privity and under whose direction a marshal's sale is made, is estopped from controverting the sale so far as relates to any interest he possessed.

An equitable title is sufficient in Pennsylvania to recover upon in partition.

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Binney and *Chauncey*, for the defendant, and *J. Sergeant* and *Rawle*, for the plaintiffs. The case was submitted to the Court without argument.

The opinion of the Court was delivered by

TILGHMAN C. J.—In this action of partition, the plaintiffs claim thirty-three-eightieths of a house and lot in Front street in the city of *Philadelphia*. They derived their title from *John Nixon* deceased, who was a purchaser at a sale by the marshal of the *United States*, by virtue of a writ or writs of *Venditioni Exponas* issued from the District Court of *Pennsylvania*. And in order to make good the plaintiffs' claim to thirty-three-eightieths, it was necessary to shew that the marshal had lawfully sold all the interest in this house and lot, which was vested in *Francis West*, *Benjamin West*, and the heirs of *John West*, deceased. The plaintiff proved that the *United States* had obtained judgments against *Francis West*, *Benjamin West*, and the heirs of *John West*; and that a *venditioni exponas* had issued regularly on the judgment against the heirs of *John West*, upon which the marshal advertised, that he would sell all the rights of *Francis West*, *Benjamin West*, and *John West*, deceased, and actually did sell and convey all their rights to *John Nixon*, who was the highest bidder at the sale. But the plaintiffs could not shew, that writs of *venditioni exponas* had issued on the judgments against *Francis* and *Benjamin West*. They gave evidence however, that the right of *Benjamin West* was vested in *Francis West*, and that the marshal made sale of the interest of *Francis* and *Benjamin West*, at the request, and under the direction of *Francis West*. Judge DUNCAN, before whom the cause was tried, charged the jury, that if they should be of opinion that the sale was made with the privity, and under the direction of *Francis West*, and that he possessed the interest of *Benjamin*, he was estopped from controverting the sale, and the verdict should be for the plaintiffs. There is no doubt that this direction was right, for it would be against all equity, to permit the purchaser's title to be disturbed, by the man who encouraged him to make the purchase. The only question then, will be, whether this kind of equity is sufficient to support an action of partition. This hardly deserves the name of question, as it is very clear that if such

a title be not sufficient, the common transactions of business will be brought to a stand in *Pennsylvania*. If we had a Court of Chancery, it would compel *Francis West* to execute a conveyance, to the plaintiffs. But we have no such Court; our practice therefore has been, in such case, to consider that, as actually done, which a Chancellor would decree to be done. That is, applying the rule to the case before us, we assume that a conveyance has been made by *Francis West* to the plaintiffs. Upon that assumption, the jury proceeded, when, under the charge of the Court, they found a verdict for the plaintiffs. I am of opinion therefore that the verdict was right, and the motion for a new trial should be denied.

Motion for a new trial denied.

GIBSON J.—Did not sit in this cause, being related to one of the parties concerned.

The Commonwealth *against* GILLESPIE and another.

Monday, January 7.

THIS was an indictment containing nine counts against *D. Gillespie* and *O. H. Gregory*, found in the Mayor's Court of the city of *Philadelphia*, and removed to this Court by

A count in an indictment charging that the defendant sold a lottery ticket and tickets, in a lottery not authorised by the laws of the Commonwealth, is bad for its generality. It should specify the name of the lottery, and the number of tickets sold.

But a count, charging a conspiracy to sell a lottery ticket and tickets, in a lottery not authorised by the laws of the Commonwealth, is good.

It is no objection on demurrer or in arrest of judgment, that several distinct offences of the same nature, are joined in the same indictment, whether in misdemeanour or felony: but the Court might, in their discretion, compel the prosecutor, in felony, to elect on what charge he would proceed.

Several persons may be charged in the same indictment, for the same act, when the act admits of the agency of several.

So, also, several persons may be charged in the same indictment, in different counts, for different offences, though the Court, in its discretion, might quash such indictment.

One may be made liable criminally for the acts of his agent, if he had a participation in them: and the jury may deduce such participation from circumstantial evidence.

A conspirator may be convicted in the place where the overt act is done in pursuance of the conspiracy. One who procures a misdemeanour to be committed, is guilty in the place where it is committed by his procuree.

If the indictment charge that the defendant sold a lottery ticket, in the words and figures following, it must contain a literal recital of the ticket; and a variance in spelling a name, though the sound is the same, as, Burrill, for Burrall, is fatal.

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certiorari. It was tried before Duncan J. at *Nisi Prius*, in *November*, 1821, and a verdict of guilty was rendered on the first, third, fifth, sixth and ninth counts, and of not guilty on the second, fourth, seventh and eighth counts.

The *first* count charged that both the defendants did conspire to sell and expose to sale, and cause and procure to be sold and exposed to sale, a lottery ticket, and tickets in a lottery not authorised by the laws of the Commonwealth.

The *second* count charged that they did combine to advertise and cause to be advertised for sale, a lottery ticket and tickets in a lottery not authorised by the laws of the Commonwealth.

The *third* count charged that they did sell and expose to sale, and cause to be sold and exposed to sale a lottery ticket and tickets, in a lottery not authorised by the laws of the Commonwealth.

The *fourth* count charged that they did advertise and cause to be advertised for sale a lottery ticket and tickets in a lottery not authorised by the laws of the Commonwealth.

The *fifth* count charged that *Gillespie* did sell and expose to sale, and cause to be sold and exposed to sale, a lottery ticket and tickets in a lottery not authorised by the laws of this Commonwealth.

The *sixth* count contained the same charge as the fifth, against *Gregory*.

The *seventh* count charged that *Gillespie* did advertise and cause to be advertised for sale a lottery ticket and tickets in a lottery not authorised by the laws of this Commonwealth.

The *eighth* count charged the same offence as the seventh, against *Gregory*.

The *ninth* count charged that both did sell and expose to sale, and caused to be sold and exposed to sale a lottery ticket in a lottery not authorised by the laws of this Commonwealth,

which said lottery ticket is in the words and figures following, that is to say:

STATE OF NEW-YORK.

THIRD LOTTERY. EXCELSIOR. No. 3436.

LITERATURE LOTTERY. No. 3.

MANAGERS. Jonathan Burrill.—John B. Yates.—Gideon S. Mumford.—Charles D. Cooper.

THIS Ticket will entitle the holder to such prize as shall be drawn to its number, in the Third Lottery for the promotion of Literature and for other purposes, agreeably to the Act of the Legislature of this State, 13th April, 1814, subject to a deduction of fifteen per cent.—New-York, November, 1819.

JON. BURRALL, *President.*

J. B. YATES, *Secretary.*

In the original ticket given in evidence, the name in the margin was *Jonathan Burrall*, and the letter *B* was written thereon, immediately before the name of *J. B. Yates*, Secretary.

The defendants now moved in arrest of judgment, and also for a new trial, and assigned the following reasons.

Reasons in arrest of judgment.

1. The offence, for which the defendants are indicted, is not described with sufficient certainty.

2. The indictment is against two defendants, and contains counts against each of them separately.

3. Two or more distinct offences are charged in the same counts in the indictment.

4. The verdict is against the two defendants, not only upon counts in which they are both counted against, but upon counts in which they are charged singly and separately.

Reasons for a new trial.

1. There was a variance between the ticket described

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in the ninth count of the indictment, and the ticket given in evidence upon that count, to the jury.

2. The court erred in admitting as evidence to go to the jury, a ticket which varied from the ticket described by words and figures in the indictment.

3. The verdict was against law and evidence.

Chauncey and *Binney*, for the defendants, now argued both these motions.

The offence is not described with sufficient certainty.

It is an invariable rule in an indictment, that the offence is to be particularly set out, except in indictments against common scolds and barretors. The facts of the offence should be stated specially, 1 *Chitt.* 227. 231. 2 *Hawk. Ch.* 25. *sec.* 57. 59 .74. 1 *Show.* 390. 2 *Leon.* 38. 2 *Hale.* 169. 182. In the case of *Stewart* v. *The Commonwealth*, 1 *Serg. & Rawle*, 342, this Court determined that a charge that the defendant stole, took and carried away sundry promissory notes for the payment of money of the value of eighty dollars, was too vague and uncertain, and reversed the judgment. Further, two persons cannot be indicted for two separate offences in the same indictment. Yet, here the defendants are charged in the same counts, with selling a ticket or tickets, or causing them to be sold. In *United States* v. *Sharpe et al.* 1 *Pet.* 118, it was held that the several offences cannot be charged in the same count of an indictment. As to the conspiracy charged, there is no Act of Assembly, making a conspiracy to sell lottery tickets, unlawful.

We contend that there should be a new trial, because there are variances between the last count of the indictment, and the lottery ticket given in evidence. In the indictment, the name is *Burrill*, in the ticket, *Burrall*. The indictment has no letter *B*: in the ticket, there is the letter *B*. Yet, the indictment lays the ticket "in the words and figures following." The Commonwealth is therefore bound to prove it as laid, even to a letter. There ought, also, to be a new trial, because there was no evidence of any conspiracy. The evidence was, that *Gregory* sold one ticket, on which the jury found them guilty jointly and severally. It appeared, that *Gillespie*, lived in *New York*, and *Gregory* was a boy about fourteen years of age, in the office. He must have been the

servant of *Gillespies'* agent, and he sold the ticket. *Gillespie* might be guilty of selling through his agent, but was not guilty of conspiracy. One is not answerable criminally for the act of his servant, unless the servant acted by his order.

Biddle and *Kittera*, for the Commonwealth.

1. The conspiracy is the crime ; the thing conspired to be done need not be specially described. 3 *Chitt.* 1143. A conspiracy, to indict one of a crime punishable by law without setting forth the crime, is good, 2 *Burr.* 993. In *Collins* v. *The Commonwealth*, 3 *Serg.* & *Rawle*, 220, it is decided that the conspiracy alone constitutes the offence. Here, the offences are set out in the words of the Act of Assembly, and where a statute constitutes the offence, it is sufficient to charge it in the words of the Act. 3 *Bac. Ab.* 570. *Commonwealth* v. *Boyer*, 1 *Binn.* 201. 2 *Yeates.* 451. 2 *Hale's P. C.* 170. *East's C. L.* 985. Certainty to a common intent is sufficient. 1 *Chitt.* 159. 1 *Mass. Rep.* 340. 2 *Mass. Rep.* 378. 397.

2. It is objected, that the two defendants are indicted for separate offences. Where several join in an offence, they may be joined in the same indictment. 1 *Chitt.* 280. The Act of Assembly of the 28th of *March*, 1805, *Purd. Dig.* 274, requires that where several join in an offence, they shall be joined in the same indictment.

3. Two separate offences are not joined in the same count of this indictment. Doing and causing to be done are the same thing, and are always charged as one. Composing, printing and publishing a libel are joined in the same count. 1 *Chitt.* 169. Thus, that the defendant did set up, occupy and exercise a trade. 2 *Chitt.* 506. So, also, where a statute was enacted against packing, loading or putting on board, &c., the indictment charged that the defendant did pack, load and put on board. 2 *Chitt.* 250.

4. The fourth reason is not founded in fact : both the defendants were not convicted on any count against one. If it appear so, it is a clerical error.

On the motion for a new trial, they contended that the variance alleged in the name, was in the ornamental part—in the margin where the names of the managers were inserted.

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Besides, the names are in sound the same, whether spelled *Burrill* or *Burrall*; and such variance is immaterial. 1 *Phil. Ev.* 166. Variances in stating, *U. States* for *United States*, *Ontario Messenger* for *The Ontario Messenger*, *William T. Robinson* for *William Robinson*, were held not material. 5 *Johns.* 127. 10 *Johns.* 543. 5 *Johns.* 84. The other alleged variance in the letter *B.* was left to the jury for them to determine, whether it was on the ticket when sold, or placed there afterwards to denote that it drew a blank. The principal is liable for the acts of the agent. *B. N. P.* 6. 4 *Bac. Ab.* 458.

The opinion of the Court was delivered by

Duncan J.—This indictment consisted of nine Courts. The jury have found separate verdicts.

On the *first*, which was for conspiring to sell lottery tickets, in a lottery not authorised by the laws of this Commonwealth, the jury have found the defendants guilty, so far as relates to a ticket. On the *second*, which was for a conspiracy to advertise, not guilty against both. On the *third* count against both, for selling lottery tickets not authorised by the laws of this Commonwealth, guilty of selling a lottery ticket. On the *fourth*, for advertising such lottery tickets, not guilty. On the *fifth*, against *Gregory* for selling such lottery tickets, guilty as to one ticket. On the *sixth*, against *Gillespie* for selling such lottery tickets, guilty as to one ticket. On the *seventh*, for advertising, against *Gregory*, not guilty. On the *eighth*, for advertising, against *Gillespie*, not guilty. On the *ninth*, for selling a lottery ticket set out in words and figures, guilty against both.

The defendants have moved for a new trial, and in arrest of judgment. The motion in arrest of judgment, I will first consider. The reasons in arrest of judgment, are, that the offence, in the 3d, 5th, and 6th, counts, is not laid with sufficient certainty; that the offences could not be laid in the same indictment; that the defendants could not be indicted jointly and severally in the same indictments. I do not think it necessary to set out the ticket or tickets; but the indictment should state, what was the name of the lottery, and the number of tickets sold, where the charge is for advertising or selling. For the charge must contain a certain des-

cription of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offence, and the defendant be put on his trial for another, without any authority; so that the Court may see a definite offence on record, that they may apply the judgment, and the punishment which the law prescribes; and so that the defendant's conviction or acquittal may insure his subsequent protection; that he may be enabled to plead it in bar of any subsequent proceedings. The indictment ought to state the fact, with as much certainty as the nature of the crime will admit. There are cases, consisting of a series of transgressions, which constitute the offence, a being a common scold or barretor; keeping a disorderly house, &c., where it must be charged generally. An indictment ought, at least, to be as certain as a declaration. An indictment for fishing in a fishery, and taking away divers fish, was bad at common law. *Key* v. *Marshal*, 2 *Keb.* 594. For it is material that the defendant should be apprised of the charge against him, in order to prepare for his defence; and it is clear that an indictment for stealing divers fish, not specifying the number, would be insufficient. *Paley on Convictions*, 82. An indictment for engrossing a great quantity of straw and hay, without mentioning the quantity, quashed for uncertainty. *Cro. Car.* 380. 1 *Stra.* 497, *King* v. *Gibbs*. Indictment for selling divers quanties of beer in unlawful measures, is too general; for the Court cannot form a judgment in what degree to punish the defendant. In trespass, the number and nature of things ought to be mentioned. *Playter's Case*, 5 *Rep.* 34.

A conviction on *Stat.* 43. *El. C.* 7, for cutting down divers lime trees, quashed for uncertainty; the number not being set out. *Queen* v. *Burnaby*, 2 *Ld. Raym.* 900. In trespass for taking divers goods, not saying what goods, judgment arrested after verdict, for uncertainty in not specifying what the goods were, so that the recovery could not be pleaded in bar of another action brought for the same goods. *Wiat* v. *Essington*, 2 *Ld. Raym.* 1410; and see 2 *Saund. notes*, 310. The third, fifth, and sixth counts, cannot be supported, and judgment on them must be arrested. In *Stewart* v. *The Commonwealth*, a judgment on an indictment for stealing

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sundry promissory notes for the payment of money of the value of eighty dollars, of the goods and chattels of *A.*, was reversed for the vagueness and uncertainty, 4 *Serg.* & *Rawle*, 194.

But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indictment for stealing, or action for trespass, where the offence consists of an act done, which it is clearly in the power of the prosecutor to lay with certainty. The conspiracy here was, to sell prohibited lottery tickets, any that he could sell; not of any particular prohibited lottery, but of all. The conspiracy was the *gravamen*, the *gist* of the offence.

These several charges, as laid in the indictment, are different modes of laying the same offence. But if the offences were different, separate offences, it is no objection either on demurrer or in arrest of judgment, that separate offences of the same nature, are joined against the same defendant. Even in case of felony, though it be true that no more than one offence should regularly be charged, in one indictment, and that the Court would quash the indictment before plea, or, if on the trial, the Court should think it might confound the prisoner, they may exercise a discretion in compelling the prosecutor to elect on which charge he will proceed, yet even in felonies, there is no objection to the insertion of several distinct offences of the same degree, though committed at different times, in the same indictment against the same offender; and it is no ground of demurrer, or in arrest of judgment, and counts, where offences are of the same nature, counts at common law, and on a statute, may be joined, 1 *Chitty C. L.* 175. In misdemeanor, no objection can be made to joining several in the same indictment in any stage of the proceeeding. 2 *Burr.* 984. Nor does it form any objection, that several are joined in the same indictment, for the same act. For though torts are in their nature several, and each one must answer for his own independent crime, yet when the act admits of the agency of several, as assault and battery, or libel, they may be indicted jointly or severally. Not so of perjury, because the assignment must be of the very words uttered, and the words of one cannot be applied to another; or where the criminality arises in consequence of some personal disqualification, as for exercising a trade not

having served a due apprenticeship. Nor is the objection maintained, that several persons could not be severally indicted in the same bill for separate offences. For though it might be in the discretion of the Court, to quash such indictment, yet it cannot be taken advantage of in arrest of judgment. For they are considered as several indictments in point of law. *Ld. Hale*, 2 *H. H. P. C.* 174, says, "it is in common experience at this day, that twenty persons may be indicted for keeping disorderly houses, and they are duly convicted on such indictments; for the word *separalite* makes the several indictments." The first and ninth counts are good counts, and judgment should be rendered on them.

But there is a motion for a new trial, on the first, as being a verdict against evidence, and on the ninth on account of the variance between the ticket described in the indictment, and that given in evidence. The evidence was, that a lottery office was kept in a house rented by *Gillespie* in this city, for several years, under a sign in the name of *Gillespie's* lottery office; that *Gregory*, a young lad, acted as his servant, or agent in that office, and sold the ticket produced in evidence, a *New York* literature lottery ticket, and indorsed in the name of *Gillespie;* a lottery not authorised by the laws of this Commonwealth; that *Gillespie* occasionally visited *Philadelphia.* I did not instruct the jury, that *Gillespie* was criminally answerable for the act of his agent or servant, but I left them to decide, whether, from the whole body of the evidence, *Gillespie* was concerned in the sale of this ticket. The house his; the boy conducting business for him as a lottery broker, under his sign; selling this very ticket as his agent, and in his name. These were circumstances, from which the jury might infer his participation in the sale of this ticket; more especially as, if the boy had been employed as his agent to sell tickets authorised by the laws of this State, and not tickets prohibited, a production of his books would establish his innocence. That criminality, even in acts of the blackest dye, might be made out by circumstantial evidence. I put to the jury as examples, libels sold by a child in the shop of a printer; tippling houses, liquor sold by a boy; bawdy houses, where the keeper kept out of view herself, though she was the owner of the house; and I did put it to the jury as a case in which the *evidentia rei*, the

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res ipsa loquitur, might afford satisfactory evidence of the participation of *Gillespie*. But it was for them to draw their own conclusion of participation or not. If they found he had not participated in the transaction, they were instructed to acquit both, as to the indictment for conspiracy, if otherwise, to convict. They have been convicted, and to my entire satisfaction. For the law would be a dead letter—we would become the laughing stock of our sister States, either for the inaccuracy and little foresight of our law makers, or for the imbecility of those employed in the administration, if such a procedure as this was not brought within the law, if our neighbours from *New York* or *Baltimore*, could levy a revenue in this State, by the employment of a child or a slave. It makes no difference where *Gillespie* resided, if he conspired to sell *New York* lottery tickets in *Pennsylvania*, with his agent, and the agent effected the act, the object of unlawful conspiracy; he is answerable criminally to our laws. In this offence, there is no accessary. It must be recollected, the conspiracy is a matter of inference, deducible from the acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them, and which rarely are confined to one place; and if the parties are linked in one community of design, and of interest, there can be no good reason, why both may not be tried, where one distinct overt act is committed. For he who procures another to commit a misdemeanour, is guilty of the fact, in whatever place it is committed by the procuree. For if *Gillespie* was not accountable to our laws, then this offence would within our State be committed by him with impunity. For that consequence must follow, from its being held to be no crime in him, residing in *New York*, to procure the selling of lottery tickets in *Pennsylvania*, and the argument must rest on the position, that he owed no obedience to these laws, and had been guilty of no offence in contravening them.

This count was not abandoned on the trial on the part of the State. I do not precisely recollect, whether the gentlemen who conducted the prosecution, in stating the testimony, applied it to each count. Nor was there any occasion for this: for it equally went to prove every count in the indictment, as it did to any one. But I well recollect, there was an address

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to the Court on the insufficiency of this count. I am of opinion, and in this, every member of the Court agrees, that the verdict was not contrary to the evidence.

On the variance between the ticket described in the ninth count, and the ticket given in evidence; on very full consideration, I am of opinion, I decided erroneously. I was led into error by not discriminating sufficiently between allegations of description and those of substance between pleas in abatement, and questions of identity, and matters of literal description; and confess, I was carried away by the *idem sonans*, by the sound, as I must say, rather than by the real substance of the rule. Where, the prosecutor has undertaken to set out the lottery ticket, *literatim*, in words and figures following, this imports a tenor—a transcript, and implies the very same. Where a letter, omitted or changed, makes another word, though it be insensible, the variance is fatal. *Queen* v. *Drake*, 1 *Salk.* 660. The case of *Williams* v. *Ogle*, 2 *Str.* 889, is the only case to be found, where on *nul tiel record*, the change of a letter in a name, which did not alter the sound, as *Segrave* and *Seagrave*, was not held to be a fatal variance. 2 *Str.* 889. But, it is but a short statement of three lines, and the reporter adds a *quære tamen*, where the party has something else to go by, than the sound. It is true, *Chitty*, in his *Criminal Law*, 1 *Chitty*, 284, gives credit to this case, which the reporter, himself, had discredited. The sound in names, is what governs in cases of pleas of *misnomer*, questions of identity; there, it does not depend on the omission of a letter making another word, but another sound; for I think it has been determined that in these cases, *Shakespear*, *Shackspere*, are the same, because *idem sonans*. But if you omit the *s* in the middle, and give it another sound, there is a failure, as *Shakepear*. *Burrall*, *Burrill*, *Burrell*, are certainly *idem sonans*, and so is *Burwell*; but I do not suppose, that in an indictment for forgery, setting out the instrument *in hæc verba*, that stating it to import to have been given by *Burrill*, would be supported by a paper, signed *Burwell*; now, the *idem sonans* must hold in every case of description, or there is nothing in it. Would it do in *Leigh* and *Lee*, *Caldcleaugh* and *Calclew*, *Duncan* and *Dunkin*? Would it do in *Tallifer for Taliafero*, *Chumley* for *Cholmondely*?

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Sound may be the substance of a name, and when it is a matter of substance, it might hold, like any other allegation of substance; but sound is not a matter *verbatim et literatim.* A name is a word, and in undertaking to set out the name *literatim* it was not a *vox et preterea nihil.* Different letters will make different names, though the sound be the same. The word would then be a different word—another word; which in all cases of description, makes the variance fatal. Had this been set out in the manner following, the variance would not have been fatal; but when the phrase by legal intendment professes an exact recital, as here in the words and figures following, all the cases seem to require a literal precision, unless where it does not change one word for another. The verdict on the last count ought not to stand, but on the Attorney General entering a *nolle prosequi* on that count, I can see no difficulty in entering judgment on the first count, as the verdict is separate. I see nothing to prevent a *nolle prosequi* on the ninth, at any time before judgment, for the ticket was proper evidence on that count. There is nothing in the objection, as it relates to the uncertainty in the verdict. The verdict, in making up the record, would stand, that the defendants and each of them were guilty in manner and form, as they stood indicted on each count.

Jackson *against* Wetherill.

Wednesday, January 7.

In Error.

An assertion by the vendor to the vendee at the time of selling a mare, that he is sure she is safe, and kind, and gentle in harness, amounts merely to a representation, and does not constitute a warranty, or express promise that she is so.

ERROR to the Court of Common Pleas of *Philadelphia* county.

This action was brought by *Samuel P. Wetherill*, plaintiff below, against *William Jackson.* The opinion of the Court

below, delivered in their charge to the jury, was filed of record, at the request of the defendants' counsel. It was now brought up by the writ of error, and was as follows :

The defendant sold the plaintiff a mare for 150 dollars ; but, after trial, alleging that she was not such a mare as he had contracted for, offered to return her, and demanded his money back. The defendant refused to receive her, or pay back the money. Whereupon the plaintiff sold her at the horse market for seventy-two dollars, thirty-eight cents, and now sues for the difference. It is testified, that before the plaintiff agreed to purchase the mare, the defendant told him, repeatedly, *he was sure she was perfectly safe, kind, and gentle in harness*, and that the plaintiff, being satisfied as to her safety, purchased her. The Court are of opinion, that no particular form of words is required by law to constitute a warranty, and that the communication, thus proved, did amount to a warranty by the defendant, that the mare was perfectly safe, kind, and gentle in harness.

Kittera, for the plaintiff in error, cited 1 *Bac. Ab.* 80. 2 *Selw. N. P.* 580. 585. 6 *Johns.* 138. 1 *Johns.* 463.

Swift, contra, referred to 2 *Selw. N. P.* 586. *note.*

The opinion of the Court was delivered by

DUNCAN J.—In this action, which on the state of the record and charge of the Court, must be considered as an *assumpsit* on the warranty of a mare, sold by *Jackson* to *Wetherill*, and not an action of deceit for a false representation of her qualities, the only question was, whether evidence that before *Wetherill* had agreed to purchase the mare, *Jackson* had told him repeatedly he was sure that she was perfectly safe, kind, and gentle in harness, and that *Wetherill*, from this statement, being satisfied as to her safety, purchased her, amounted to a warranty. The Court of Common Pleas were of opinion, that this communication amounted to a warranty that the mare was perfectly safe, kind, and gentle in harness.

It seems a principle well settled by the common law, that with regard to the goodness of wares purchased, the vendor

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is not bound to answer, unless he expressly warrant them to be sound and good, or there has been a fraudulent representation, an affirmation of a quality known to the vendor to be false. To constitute an express warranty, for there is none implied from the mere sale, no set form of words is required. The use of the word warrant, though it be the one generally used, is not so technical, that it may not be supplied by other words. But the words used must be tantamount; they must not be dubious, or equivocal; but it must appear from the whole evidence, that the affirmant intended to warrant, and did not express a mere matter of judgment or opinion. From the time of *Chandler* v. *Lopus*, *Cro. Jac.* 4, to the present day, the doctrine has been, that a bare affirmation of quality will not give a cause of action, unless the vendor knew it was not of the quality he represented it to be, or had warranted it to be so. *Jackson* might have very truly said, that he was sure she was perfectly gentle in harness, without any deceit. It was an expression, and a pretty strong one, I admit, of his judgment and opinion, and if the contrary were known to him, would give a cause of action very different from warranty, in which it would be incumbent on the defendant in error to prove his knowledge of its falsity, the *scienter* being the *gist* of the action: whereas in the warranty, the undertaking is. In *Seixas & Seixas* v. *Woods*, 2 *Caines*, 48, it was held, that a description in a bill of parcels of the article as brazilletto wood did not amount to a warranty. An express promise, that a thing shall be of a certain quality, would be equivalent to warranty, and in that case it may be stated in the declaration as a warranty; for no declaration could be supported, that did not allege an expres swarranty or fraud. In *Holden* v *Dakin*, 4 *Johns.* 421, where *A.* sold paint to *B.* for good *Spanish* brown and white lead. The paint proved to be bad, and of no value. It was held, there was no warranty in this case, and to make it actionable there must be either an express warranty or fraud. *Peake*, in his treatise on evidence, 2d vol. 223, lays down the proposition too broadly; that in general, any representation made by the defendant at the time of the sale of the state of the thing sold, will amount to a warranty at law. It is believed, there is no decision, which would justify the position, that a bare affirmation without knowledge of the defects, or that

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the quality was different from what he affirmed it to be, would support an action. 1 *Fonb.* 120. *Caveat emptor*, will apply with more force to the sale of a horse than any other article; a horse being more the subject of speculative dealing than almost any chattel, and being more liable to secret maladies than any other animal, (which maladies are frequently not discernable on inspection or mere trial,) it is usual to require from the seller a warranty of soundness as to latent defects. Dealers in horses do not lay themselves under much restriction in praise of their animals; but you touch a tender point when you propose warranty. The words used, I am sure she is safe, kind, and gentle in harness, do not amount to an express promise or engagement that she was so; much less to a direct warranty. It is the case of a representation, and if made with the knowledge of its falsehood, would render the party liable in an action of deceit, but not in *assumpsit* on the warranty. The judgment is reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

BYRNE and others executors of BYRNE *against* WALKER for the use of HUTCHINSON and others.

IN ERROR.

Monday, January 7.

ERROR to the District Court for the city and county of *Philadelphia*.

Where there is a judgment existing against an intestate, which is found by auditors, appointed by the Orphans' Court, to absorb all the assets, neither they, nor the Orphans' Court, have any power to decide who is entitled to the benefit of that judgment: the only object of their appointment is to make a division *pro rata*, among the creditors, in certain cases mentioned in the Act of 1794.

Assignees under a commission of bankruptcy, issued in England, cannot support an action in their own names, but it seems, if no adverse claim appears, they may be marked as the *cestui que* use of a judgment obtained in the name of another, as plaintiff, and the defendant cannot object to payment on that ground.

If another claimant appear, the Court below, even after the judgment is affirmed, and the record remitted, might stop the payment, till the respective rights of the claimants were decided.

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This was an action in the name of *Alexander W. Walker*, the plaintiff below, marked for the use of *Joshua Hutchinson*, *Joshua Scholefield*, *William Whiteman*,, *John Adams* and *Joseph Johnson*, against *Eleanor Byrne*, *Alexander M'Causland* and *Henry C. Byrne*, executors of *Patrick Byrne*, deceased, on a bond given by the said *Patrick Byrne*, as security for the faithful administration of *Eleanor Wray*, who was the administratrix of *George A. Wray*, deceased.

A verdict was given in the Court below, for the plaintiffs, for 1291 dollars, 69 cents, subject to the opinion of the Court, on the following facts in the nature of a special verdict: on which, the Court below gave judgment for the plaintiffs.

George A. Wray, deceased, was in his life time, indebted to *Alexander W. Walker*, by a bond in the penal sum of 10,000 pounds, on which judgment was entered by warrant of attorney, the 29th of *October*, 1811. After the death of *George A. Wray*, a *fieri facias post mortem*, was issued against *Eleanor Wray*, administratrix, &c. of *George A. Wray*, deceased, in which judgment was confessed on the 22d of *March*, 1815. A *fieri facias* was issued to *June*, 1815, and returned *nulla bona*. On the 15th of *July*, 1815, which was before the return of the *fieri facias*, *Eleanor Wray*, paid 3900 dollars to *Walker's* attorney.

Patrick Byrne, was surety for the faithful administration of *Eleanor Wray*, by a joint and several bond, on which suit was brought in the name of the Commonwealth, against *Patrick Byrne's* executors, abovenamed, and judgment given for the Commonwealth. On the 18th of *February*, 1813, *Eleanor Wray* settled her administration account at the register's office, when a balance of 5191 dollars 69 cents was reported to be in her hands for distribution. On the 16th of *July*, 1813, in the Orphans' Court, the auditors reported that the account was just, and ought to be allowed. On the 20th of *August*, 1813, on the application of *Walker's* attorney, the Orphans' Court appointed auditors to settle and adjust the rates and proportions of the remaining assets of *George A. Wray*, deceased, in the hands of the administratrix, among the respective creditors of the deceased, who reported the

said balance of 5197 dollars 69 cents, and that the judgment confessed in his life time by *Wray*, in favour of *Walker*, was the only judgment that was entitled to priority, and absorbed all the assets, but that *Walker*, after obtaining it, had become bankrupt in *England*, and insolvent in *Pennsylvania*, and that they (the auditors) could not say which class of assignees should of right receive the money.

To the *scire facias* sued by the present defendants in error, against the present plaintiffs in error, on the judgment obtained, as aforesaid, by the Commonwealth, it was objected in behalf of the executors of the surety in the administration bond.

1. That until the Orphans' Court, acting on the auditors' report of the 20th of *August*, 1813, limit and appoint by their decree and sentence, the person or persons respectively to whom the assets should be delivered and paid according to law, the surety in the administration bond cannot be made liable for the alleged breach of it.

2. That the English assignees of *Walker*, the plaintiffs below, are not entitled to priority and payment of the money in question.

3. That the legal capacity of *Hutchinson* and others, for whose use the suit was prosecuted, should appear of record.

C. J. Ingersoll, for the plaintiffs in error.

1. No suit lies against the defendants, until the Orphans' Court shall decide to what persons the assets shall be paid. The condition of the administration bond is, that the administrators shall pay unto such *person or persons* respectively, as the Orphans' Court, by their decree or sentence, limit and appoint. Act of the 19th of *April*, 1794, sec. 1. (*Purd. Dig.* 288.) So, the auditors are to settle and adjust the rates and proportions of the remaining assets, due and payable to such *respective creditors*, &c. Ib. sec. 14. (*Purd. Dig.* 291.)

2. The *English* creditors have no right to this debt. It was decided in *Milne* v. *Moreton*, 6 *Binn.* 353, that assignees under a commission of bankruptcy in *England*, cannot claim against a creditor here, who levies a foreign attachment; nor will the Court permit them to sue here.

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3. The legal capacity of the *cestui que use*, should appear on the record. He cannot recover without shewing his title.

Bradford, contra, stated that at the time the bond and warrant were given by *Wray* to *Walker*, the bond was given for a debt due to *Alexander W. Walker and sons, and Co.* He contended,

1. That the Orphans' Court had nothing to do with creditors, except to prevent illegal preferences, where the assets fall short. Auditors were appointed, and they found that this single judgment absorbed all the assets, but did not pretend to decide who was entitled to receive the money due on the judgment. No claim was made on the trial on behalf of the assignees of *Alexander W. Walker*, under the insolvent laws here. He was insolvent here in his individual capacity: but the judgment belongs to the partnership.

2. *Alexander W. Walker*, had a right to mark this suit for whose use he pleased. There was no necessity to mark it for the use of any body; it is a mere memorandum. The issue on which the cause was tried was payment. No notice was ever given to the defendants not to pay the money to the plaintiffs. Nor are the defendants bound to pay over the money after judgment: if any one thinks proper to claim a right to it, it may then be decided between them.

The opinion of the Court was delivered by

TILGHMAN C. J.—This is an action in the name of *Alexander W. Walker*, (marked for the use of *Joshua Hutchinson and others*,) against the executors of *Patrick Byrne*, deceased, on a bond given by the said *Patrick Byrne*, as security for the faithful administration of *Eleanor Wray*, who was administratrix of *George A. Wray*, deceased. It appears, that *George A. Wray*, being indebted to the house of *Alexander W. Walker and sons, and Co.*, gave his bond, (with warrant of attorney to confess judgment) to *Alexander W. Walker*, the plaintiff, one of the said house, in the penalty of 10,000 pounds, to secure the said debt; and judgment was entered on the said bond, in the life time of the said *George A. Wray*. *Eleanor Wray* settled her administration account in the Orphans' Court, on which a balance of 5191 dollars 69 cents,

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was found to be in her hands, subject to the payment of the intestate's debts. Auditors were appointed by the Orphans' Court, to ascertain the amount of debts due from the intestate, &c. according to the Act of Assembly, in such case provided, who reported the balance abovementioned to be in the hands of the administratrix, and that *Walker's* judgment, which was the only judgment against the intestate, was more than sufficient to cover the whole balance aforesaid. And in addition to this, the auditors reported "that after the entry of *Walker's* judgment, he had become a bankrupt in *England*, and insolvent in *Pennsylvania*, and that they, the said auditors, under the said circumstances, could not say which class of assignees should of right receive the money."

On the trial of the cause in the Court below, the defendants' counsel made two objections to the plaintiff's recovery, which have also been urged on the argument in this Court. 1st. That no action lay against the defendants, on the administration bond of *Patrick Byrne*, until the Orphans' Court decided on the report of the auditors. 2d. That the *English* assignees of *Walker*, under a commission of bankruptcy, issued against him in *England*, (for whose use this suit is brought,) cannot support an action in *Pennsylvania*.

1. There is no weight in the first objection. It would be in vain to wait for the opinion of the Orphans' Court, because that Court had no right to decide, who was entitled to the benefit of *Walker's* judgment. No decree which that Court could make on that subject, would be obligatory on the Courts of common law. Indeed, the auditors ought not to have meddled with the *property* of the judgment. When they had said, that its amount was sufficient to absorb the whole balance in the hands of the administratrix, they should have stopped. The only object of appointing auditors, is to make a division *pro rata*, of the assets, in certain cases mentioned in the Act of Assembly. But here, there could be no division *pro rata*; because there was but one judgment, and no other debt of equal dignity. The assets were all absorbed by this judgment. To whom the benefit of the judgment belonged was another question, with which the auditors had nothing to do.

2. Neither do I think, there is any difficulty in the second question. Assignees, under a commission of bankrupt, is-

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sued in *England*, cannot support an action *in their own names*, in this Commonwealth. But, this action is not brought in the names of the assignees. It is brought in the name of *Alexander W. Walker*, the obligee in the bond of *George A. Wray*. The form of action, therefore, is right. Whether the *English* assignees are entitled to the benefit of *Walker's* judgment, is a question, not necessary, at present, to be decided. I may say, however, that for any thing that appears to us, they are entitled; because it is not stated in the record, that *Walker* ever made an assignment, under the insolvent Acts of *Pennsylvania*, or that he ever made a voluntary assignment of this judgment, in *Pennsylvania*, or elsewhere. And, if that be the case, there is nothing to interfere with the right of the assignees, under the *English* commission. It has been decided by this Court, that an attachment issued from one of the Courts of this State, will prevail against the assignees under an *English* commission. But, we hear of no attachment in this case. In fact, the right of the *English* assignees, has not been contradicted by any but the defendants. No person, whatever, has given notice to the defendants, of any counter claim. It is an impediment raised by themselves—for their own protection. If any other persons had claimed the benefit of this judgment, the Court would have let them in, and given them a trial. Or even yet, after affirmance of this judgment, on good cause shewn, the Court below, after the record is remitted, might stop the payment of the money, until it was ascertained, whether any other claimant had better right than the *English* assignees. But, the defendants have no pretence to stay the judgment on a suggestion that perhaps some other person may, hereafter, appear, who has better right. The money is due from the defendants, and they will be safe in paying it to the person to whom it is awarded by the judgment of this Court.

I am of opinion, that the judgment of the District Court should be affirmed.

Judgment affirmed.

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RUSSELL *against* The Commonwealth.

IN ERROR.

Monday, January 7.

ERROR to the Court of Oyer and Terminer.

This case was argued by *Phillips* for the plaintiff in error, and *Kittera* for the Commonwealth.

The opinion of the Court was delivered by

TILGHMAN C. J.—The prisoner was indicted for burglary and larceny. He was acquitted of the burglary and convicted of the larceny. The indictment did not conclude against the form of the Act of Assembly, &c. This conviction was at a Court of Oyer and Terminer, held on the 9th of *January*, 1819, at which time the defendant was under sentence of imprisonment for another offence, to continue until the 23d *December*, 1821. Judgment was given against him, in the present case, "to pay a fine of one dollar to the Commonwealth, and to undergo a servitude at hard labour in the penitentiary of the city and county of *Philadelphia* for the term of three years to be computed from the 23d *December*, 1821."

Two errors are assigned in this judgment. 1st. That judgment was given for a punishment inflicted by the Act of Assembly. 2d. That the imprisonment was to commence at a future time.

1. The first point was expressly decided in the case of the *Commonwealth* v. *Searle*, 2 *Binn.* 332. The rule laid down in that case, was, that where a statute expressly prohibits an offence, or creates an offence, and inflicts a punishment, the indictment must conclude, "against the form of the statute," or judgment cannot be given for the punishment inflicted by the statute; but where a statute only inflicts a punishment on that which was an offence before, judgment may be given for that punishment, although the indictment does not mention the statute. The decision in the *Commonwealth* v. *Searle*, was made after search of precedents and on full consideration of

Where a statute inflicts a punishment on that which was an offence before, judgmay be given for that punishment, though the indictment do not conclude *contra formam statuti.*

When a person has been sentenced to hard labour on a former indictment, and the term of imprisonment is not yet expired, sentence of imprisonment at hard labour may be passed on another indictment, to commence from the day on which the former sentence is to expire.

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the law. Both in *England* and *Pennsylvania*, the judgment in murder, has been altered by statute, yet judgment is always given according to the punishment prescribed by the statute, although the indictments do not conclude against the form of the statute. The law must, therefore, be considered as settled, and the present case falls within the rule of *Searle's* case, because the Act of Assembly which inflicts the punishment, neither *creates* nor *prohibits* the crime of larceny.

2. As to imprisonment to commence *at a future time*, it is warranted by principle, practice, and authority. It is not denied by the counsel for the prisoner, that it has been the common practice in the Courts of this State. And the very point was decided by the highest authority in *England* in the case of the *King* v. *Wilkes* in the year 1779, which, being before our revolution, is authority in our Courts. Mr. *Wilkes* was convicted in the Court of King's Bench of two libels, for one of which he was sentenced to imprisonment for ten calendar months; and for the other, to be further imprisoned for the space of twelve calendar months, to be computed from and after the determination of the first imprisonment. A writ of error was brought on this judgment to the house of lords, where it was affirmed by the advice of all the Judges. So much for authority. But to consider the thing on principle; where a man has been sentenced to imprisonment for one offence, and is afterwards convicted of another, what can be so proper as to make his imprisonment for the second offence, commence after the expiration of the first imprisonment. Would it not be absurd, to make one imprisonment, a punishment for two offences? Nay the absurdity does not end there, for unless imprisonment for the last offence is to begin where the imprisonment for the first ends, it would be impossible, under our system, to punish the offender, in certain cases, for the last offence, at all. Suppose, for instance, one who has been convicted of burglary, and sentenced to seven years imprisonment, should afterwards be convicted of larceny, for which the law does not authorise an imprisonment longer than three years; these three years must either be made to commence after the expiration of the seven, or they will be merged in them, and thus be no punishment at all. The only pretence that has been urged against this

judgment is, that if the Governor should pardon the first offence, there would be a chasm, during which the prisoner would be at large. And what then? He would still be liable to the second imprisonment, if he could be taken, when the time for its commencement arrives. But this is an inconvenience not like to happen. For if the Governor is well advised, (as we must surely presume that he always will be,) he will not pardon a prisoner, until he is informed whether he has been committed for any other offence, and being fully apprised of his situation, he will take care so to regulate his pardon, as to prevent confusion or mischief. I am therefore of opinion that the judgment for imprisonment, to commence at a future time, was good.

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The judgment of the Court of Oyer and Terminer is to be affirmed.

STOOPS and another *against* The Commonwealth.

IN ERROR.

Monday, January 14.

ERROR to the Court of Oyer and Terminer for the city and county of *Philadelphia*, held by the Justices of the Court of Quarter Sessions.

If one be charged as accessary to a felony committed by several, some of whom only are convicted, and the others not proceeded against to conviction or outlawry, he may be arraigned and tried as accessary to such as have been convicted: but if he be tried, convicted, and sentenced as accessary to all without his consent, it is error. Such consent will not be implied from the party's pleading and going to trial.

If the indictment state a burglarious entry with intent to steal, and then and there stealing, it is but one offence, *viz.* a burglary, and a count charging a party as accessary "to the felony aforesaid," is good.

Charles Loring, *James Mitchell*, *Charles A. Mitchell*, *Filatio Russell*, *Solomon Price*, *Adam Stoops*, *and* —— *Cook*, were indicted for burglary, in the said Court of Oyer and Terminer, and *Margaret Stoops* and *Ann Carson*, plaintiffs in error, were charged as accessaries before the fact, and with *Elizabeth Mitchell* and *Henry Parmelé*, as accessaries after the fact, to all the principals. *Loring* and *Russell* being

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arraigned pleaded guilty: *James Mitchell* and *Charles A. Mitchell* pleaded not guilty, and were convicted. *Price*, *Adam Stoops*, and *Cook*, never were tried or arraigned. The plaintiffs in error were afterwards tried. *Margaret Stoops* was convicted as accessary before and after the fact. *Ann Carson* was convicted of being accessary after the fact. *Elizabeth Mitchell* and *Parmelé* were tried and acquitted.

The counts in the indictment now excepted to, were the following.

1st count. That *Charles Loring*, *Joseph Mitchell*, *Filatio Russell*, *Solomon Price*, *Adam Stoops and* —— *Cook*, on, &c., at, &c. the dwelling house of *Thomas Mann*, there situate feloniously and burglariously did break and enter with intent the goods and chattels, the property and monies of the said *Thomas Mann*, in the said dwelling house, then and their being, then and there feloniously and burglariously to steal, take, and carry away, and then and there with force and arms, two kegs containing two thousand silver dollars, of the value of two thousand dollars of the goods and chattels, property and monies of the said *Thomas Mann*, in the said dwelling house, then and there feloniously and burglariously did steal, take, and carry away, &c.

2d count. That *Margaret Stoops*, *Elizabeth Mitchell*, *Ann Carson*, otherwise called *Ann Smith*, on, &c., at, &c. did feloniously and maliciously incite, move, procure, aid and abet, counsel, hire and command, the said *Charles Loring*, *Joseph Mitchell*, *Charles Mitchell*, *Filatio Russell*, *Solomon Price* and *Adam Stoops*, to do and commit the said felony and burglary, in manner and form aforesaid, &c.

3d count. That *Henry Parmelé*, *Ann Carson*, otherwise called *Ann Smith*, &c., *Margaret Stoops* and *Elizabeth Mitchell*, after the committing of the said felony and burglary, in manner and form aforesaid, on, &c., at &c., did feloniously and maliciously receive, comfort and assist the said *Charles Loring*, *Joseph Mitchell*, *Charles Mitchell*, *Filatio Russell*, *Solomon Price* and *Adam Stoops*, the said *Henry*, *Ann*, *Margaret* and *Elizabeth*, then and there, well knowing the felony

and burglary aforesaid, in manner and form aforesaid, to have been committed, &c.

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King, for the plaintiffs in error.

By the record it appears, that the plaintiffs in error were indicted and convicted as accessaries before and after the fact, to seven principals, four only of whom had been previously tried or arraigned, the remaining three never having been amenable to justice.

Two questions present themselves for consideration on this part of the record.

First, whether a party indicted as an accessary to several principals, can be tried without his previous consent, before the conviction or outlawry of *all the principals*.

Second, whether such an accessary can be tried, (without such consent,) as accessary to any other principals, than those *actually convicted*. In the case before the Court, it would be sufficient to shew the irregularity of the latter mode of proceeding, but the argument in the first branch of the inquiry necessarily includes the latter.

1. The older authorities establish the doctrine to the extent embraced in the first point, and require the conviction of all the principals, before the trial of one charged as accessary to all. *Morris Gittin's Case*, *Plowden's Com.* 98 *B.* is fully supported by 40th *Ass. Pl.* 25. *Bro.* 119. *Fitzherb. Tit. Corone.* 216. In 1 *Hale*, *Pleas of the Crown*, 624, it is said, "that if *A.*, *B.* & *C.*, are indicted as principals, and *D.* as accessary *to all*, he shall not be tried till all the principals are convicted or attainted." In 2 *Hale*, 200, a similar doctrine is laid down, and Lord COKE in 2 *Inst.* 183, 184. recognises the same principle. *Hawkins*, *B.* 2. *Ch.* 29. *Sec.* 45, while he recognises the modern rule to be, to try an accessary to several as accessary to such of his principals as may appear and be convicted, declares that the contrary opinion is supported by great authority, and that he does not find any instance in the books, wherein the Court had actually proceeded to the trial of an accessary in such a case, before *all* the principals had appeared or been attainted.

The reason of the old rule is obvious, and is most in accordance with our civil institutions. The great objection against trying a person as accessary to those who have not

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appeared, is, that it subjects the person tried to the hardship and hazard of two trials for his liberty or life; whereas if the trial were deferred until all the principals should be attainted or appear, he would be tried but once. For all the books that maintain the modern rule, agree that an acquittal of being accessary to one principal, does not prevent a subsequent trial as accessary to the other principals, when they are attainted. *Hawk. B.* 2 *Ch.* 29 *sect.* 46. The mischief arising from the introduction of this rule in criminal justice, produced in *England* the *Stat.* 43 *Geo.* III. *Ch.* 113. *s.* 5. *Russell on Crimes*, 52, which enacts, that in such case, the accessary shall only be subject to one trial, and that his acquittal when tried as accessary to one of several principals, shall be a bar to future proceeding in relation to the others. By adopting the modern, in preference to the ancient rule, the mischief remains, while the remedy provided by 43 *Geo.* III. is out of our reach.

2. But the modern rule is, that an accessary to several principal felons may be indicted as accessary to such principals as are convicted or attainted, though all are not so convicted or attainted. *Foster*, *Ch.* 2. *sect.* 1, who is the leading authority for this doctrine, goes no further than this, and subsequent elementary writers, who incorporate it, lay it down in the same way. *Chit. Crim. L.* 343. *Russell*, 52. *Hawk. B.* 2. *Ch.* 29. *sect.* 45. But this is not the case before the Court. Here the plaintiffs in error were indicted and tried not only as accessaries to four convicted principals, but to three principals who never have been amenable to justice or proceeded against in any way. Testimony under such an indictment could be received as to the defendants guilt with the absent principals and others, and facilitate a conviction in relation to those present, while the finding would be no bar to a future indictment, charging the defendant as accessary to the absent principals in the event of their attainder.

It may be argued that it does not appear, but that the proceeding was by consent, or that *Stoops*, *Price*, and *Cook* were outlawed according to the Act of Assembly. But such consent, waving an important and substantial privilege will not be presumed. *Commonwealth* v. *Andrews*, 3 *Mass. Rep.* 126. If *Stoops*, *Price*, and *Cook* had been outlawed, it should have

been set forth in the indictment or at least averred. 1 *Chitty* 274. (*Margin.*) *Foster C. L.* 365. *Com. Dig. Tit. Justices T.* (3.) *Russ. Cr.* 53. 2 *East P. C.* 782. *Hyman's case* 2 *Leach*, 925. Outlawry is a conviction, and like any other conviction should be averred in proceedings against an accessary, 1 *Dall.* 90. In *Viner's Abr.* the necessity of such an averment is expressly declared. 1. *Vin. Ab. Tit. Accessary, Letter F.* 122. *Id. G.* 119.

3. The indictment is defective. It sets forth a larceny and a burglary in one count, alleging, in the first instance, a breach and entry with intent to steal and afterwards an actual larceny in stealing, taking, &c., the money laid, while the defendants are charged as accessary to the *said felony*. *Hale* considers such an indictment as charging two offences. 1 *Hale* 559, 560. 3 *Chitty*, 10. 98. 9. In *Catherine Graham's case*, 1 *Lawyer's Magazine*, 469, the twelve Judges decided that an indictment setting forth two felonies by the principal, and charging the accessary as being such to, "the felony aforesaid," could not be supported, being too uncertain to authorise any judgment. The punishment of an accessary to a burglary differs most materially, from that of an accessary to a larceny. The difficulty of pronouncing judgment on such an indictment is obvious.

Kittera, for the Commonwealth.

The old common law undoubtedly was, that all the principals must be tried before the accessary could be arraigned. It is equally true that the rule no longer exists. Now, the accessary of several may be arraigned on the conviction of any one. The most approved modern authority establishes this. It is agreed that the proceeding would have been regular, had the Commonwealth proceeded to outlawry against the absent principals, *Stoops*, &c. Two principles are submitted to the Court in answer to the objection.

First, That outlawry is a matter *in pais*, and that this Court will presume that such outlawry was proved on the trial of these accessaries in the Court below. *Second*, That process of outlawry does not lie in *Pennsylvania*. They may have been convicted in another Court; and nothing appears to the contrary. None of the precedents sets forth the conviction or outlawry of the principal. It was properly a

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matter of defence below, and the defendants might have availed themselves of it by plea.

But is it, in *Pennsylvania*, necessary to proceed to the outlawry of the principal, before you can try the accessary? The Act regulating outlawry, 3 *Smith's Laws*, 37. *Act of September*, 1791, was passed when the Supreme Court had a general jurisdiction, and there was no difficulty in the way of the proceedings. Situated as the Court now is, outlawry in any other county but this, is impossible, and here extremely difficult. By the *habeas corpus* act, a defendant is entitled to his discharge at the second term if not tried. By the outlawry act, three terms must elapse before the outlawry of the principal can take place. The accessary might then be entitled to his discharge under the *habeas corpus* act, before the outlawry of the principal could take place. Again, if the principal chose to come in and plead before the outlawry is complete, in no district but this, could he be tried; this Court, to which the proceeding previous to outlawry must be removed, having no authority elsewhere in the Commonwealth to award a *venire*.

There are not two felonies charged in this indictment. The breaking, entering, stealing, &c., are but the component parts of one burglary. The case cited was of two obviously distinct felonies charged against the principal.

King, in reply.

The Court never will presume the existence of a state of things, which is clearly negatived by the record before them. Such a presumption would be peculiarly unauthorised in a criminal case, if it could be authorised in any case. In this indictment, *all* the principals, and all the accessaries are indicted together. In one count, the principals, *Stoops*, *Price*, and *Cook* included, are charged with the burglary, and in the second count the plaintiffs in error are charged as accessaries to them all. Had this been a separate indictment against the plaintiff as accessary, and if, in point of law, in such an indictment, it is unnecessary to set forth or aver the conviction or *outlawry* of the principals, then the reasoning might be sound.

The argument against the *convenience* of outlawry would, with more propriety, be addressed to the Legislature, than to

this Court. An Act of Assembly giving the Supreme Court power to issue a *venire* in such case, would make the system complete and harmonious. The argument drawn from the *habeas corpus* Act is equally unfounded. The construction given to that law ever has been, that if the Commonwealth is prevented from proceeding to trial by the act of the defendant, he cannot claim his discharge. If he should refuse his consent to a trial previous to the attainder of his principal, which, with his consent, would be legal, he never could obtain a discharge under the provisions of the *habeas corpus* Act.

The opinion of the Court was delivered by

DUNCAN J.—*Charles Loring*, *James Mitchell*, *Charles A. Mitchell*, *Filatio Russell*, *Solomon Price*, *Adam Stoops* and —— *Cook*, were indicted for burglary, and *Margaret Stoops* and *Ann Carson*, plaintiffs in error, with *Elizabeth Mitchell* and *Henry Parmelé* were indicted as accessaries before and after the fact, to all the principals. *Loring* and *Russell* pleaded guilty, *James Mitchell* and *Charles A. Mitchell* not guilty. *Price*, *Stoops* and *Cook* were never tried or arraigned. The plaintiffs in error were afterwards tried as accessaries. *Margaret Stoops* was convicted as accessary both before and after, *Ann Carson* of being accessary after. *Elizabeth Mitchell* and *Henry Parmelé* were acquitted.

The errors assigned are—1. That accessaries were tried and convicted before conviction of all the principals.

2. They were tried as accessaries of principals who had neither been outlawed, arraigned or convicted.

3. The indictment charges two felonies, and the plaintiffs in error were charged as accessaries to the felony aforesaid.

The offence of the accessary, though different from that of the principal, is yet, in judgment of law, connected with it, and cannot subsist without it. In consequence of this connection, the accessary shall not, *without his own consent*, be brought to trial, till the guilt of the principal is legally ascertained by the conviction or outlawry of him, unless they are tried together, and then the jury shall be charged to inquire first of the principal, and if they are satisfied of his guilt, then of the accessary. *Foster's Cr. L.* 361. As the law formerly stood, if a man had been accessary in the same

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felony to several persons, he could not have been arraigned till all the principals were convicted and attainted or outlawed; but as the law now stands, if a man be indicted as accessary to two or more, and the jury find him accessary to one, it is a good verdict, and judgment may pass upon it, 9 *Co.* 119, and the Court, in their discretion, may arraign him as accessary to such of the principals who are convicted, and if he be found guilty as accessary to them or any of them, judgment shall pass upon him. But on the other hand, if he be acquitted, that acquittal will not discharge him as accessary to the others. And when they come in and are convicted and attainted, or judgment of outlawry passes against them, he may be arraigned *de novo* as accessary to them, 1 *Hale*, 624, and he may be considered as accessary to him who has been convicted, though the evidence prove him to have stood in that relation of guilt to several. It is said by Lord HALE to be the safer course, to postpone the arraignment of the accessary till all appear or are outlawed. Now there cannot appear to be justice in trying a man as accessary to several, some of whom have been convicted, and others neither convicted nor outlawed, and that if he be acquitted on that trial, he should still be subject to a future trial on the conviction or outlawry of the others. The verdict here finds the prisoners guilty as accessary to all. The jury could not inquire into the guilt of those who had not pleaded, and yet they find them guilty as to these. The prisoners might properly have been arraigned and tried with the principals who had pleaded, but could not without their consent be put to plead on the whole indictment as to those who were not on their trial, and had neither been convicted or outlawed; and the only question is, do the arraignment and plea amount to a consent to be tried as accessaries to all? In a case so highly criminal, a silent submission probably arising from ignorance, at the time, of the right, ought not to be construed into a relinquishment of the right, and a consent to the proceedings as they took place. In *The Commonwealth* v. *Andrews*, 3 *Mass.* 126, it was held not to be a waver of the right: and the reason is much stronger why consent should not be implied in this case, where it exposed the parties to a double trial for the same offence; a matter prohibited by the Constitution. There is an insupe-

rable difficulty where none of the principals are taken or convicted, in every other part of this State, than the Courts of *Philadelphia*. For as there can be no removal by *certiorari*, into the Supreme Court, of any indictment, and as there could be no trial there, did the party come in and plead, so there can be no outlawry. This can only be remedied by the Legislature, in taking away all original jurisdiction from the Supreme Court, except in the city and county. This case of outlawry is not provided for; but the Court cannot supply the omission, and deprive the accused of a privilege which the common law has conferred on him. It appears to the Court, that there was a mis-trial, and the judgment for that reason must be reversed. But the Court order and direct, that the prisoners enter into recognisance, each in two thousand dollars, with one or more sureties, for their appearance at the next Court of Oyer and Terminer, to be held by the Court of Quarter Sessions for the county of *Philadelphia*, to answer for this offence. The Court do not think it proper to pass over in silence the last objection, which is to the indictment. This objection would have been sustained had two felonies been charged against the principal. The allegation of the prisoners being accessary to the felony aforesaid, when there were two distinct felonies against the principal, would have been defective, and have vitiated the indictment against the accessaries. But there is only one offence laid, and that is burglary. The charge is for a burglarious entry, with the intent to steal, and then and there stealing. It is all one offence, *one burglary*. The only crime laid is *burglary*.

GIBSON J. was absent.

Judgment reversed.

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BLAKER *against* COOPER for the use of RICE.

Wednesday, January 7.

IN ERROR.

If a husband, on separation, agree to pay a trustee for his wife an annuity during her life for her use, and executes a bond at the same time for paying the annuity as alimony for and during the term of her natural life, a divorce *a vinculo* and subsequent marriage of the wife, do not exempt the husband from a suit on the bond for the annuity.

ERROR to the Common Pleas of *Bucks* county, and bill of exceptions.

This was a *scire facias* on a judgment entered by warrant of attorney on a bond given by *John Blaker*, the defendant below, to *John Cooper*, the plaintiff below, for the use of *Cooper's* daughter, *Esther Rice*, late *Esther Blaker*, who was formerly the wife of *John Blaker*. During the existence of the marriage of *John* and *Esther Blaker*, on the 14th of *February*, 1814, the said *John Blaker* made a written agreement with *John Cooper*, the plaintiff, his wife's father, to the following effect: *Blaker* and his wife were to live separate; the husband was to pay to *Cooper* in trust for the wife, sixty dollars a year, by half yearly payments, *during her life;* to permit her to take all the goods she had brought to him on her marriage, and retain them for her separate use; not to make any claim to her future acquisitions, and to suffer her to live in all respects as a *feme sole*. On the same day, *Blaker* gave a bond to *Cooper*, the condition of which was "that he should pay to *Cooper*, for the use of his daughter, *as alimony for* and during the term of her natural life, the sum of 60 dollars a year, by half yearly payments." The payments were regularly made up to the 1st of *October*, 1818. On the 30th of *September*, 1818, *Blaker* and his wife were divorced from the bonds of matrimony, and on the 14th of *October*, 1818, the wife was married to a certain *John Rice*. The Court below charged the jury, that under these circumstances, the defendant, *Blaker*, still continued liable to the payment of the annuity, and the jury gave a verdict for the plaintiff. The defendant excepted to the Court's opinion.

P. A. Browne, for the plaintiff in error, contended that the defendant was no longer under any obligation to pay the annuity. The claim arose out of the marriage, and was cre-

ated in consequence of that state between the parties. Here, the marriage was not only dissolved entirely, with all its consequences and effects, but the wife had contracted a new marriage with another husband. Besides, the condition of the bond on which this suit is brought, is to pay the annuity expressly *as alimony*; and all claims for alimony cease by a divorce *a vinculo*. Alimony is treated in our Act of Assembly as a temporary allowance, the right of which is subject to be devested by the reconciliation of the parties, or suspended by the Court on petition. Act of 26th of *February*, 1817, *Purd. Dig.* 130. It is impossible that these provisions of the law can be applicable after a divorce *a vinculo*, when a new state of things arises, and all former relations and engagements are done away. He cited 1 *Fonb.* 106. *Bro. Abr.* 190. 1 *Mod.* 124. 1 *Keb.* 69. 80, 81. 87. 206. 337. 361. 429. 441. 442. 2 *Leo.* 4. *Skinn.* 123. *Salk.* 116. 1 *Lord Ray.* 444. 4 *Burr.* 2177. 2 *Black. Rep.* 1079.

Kittera, contra.

The object of the bond was to carry the agreement into effect. They were simultaneous, and must be considered as one act. The agreement makes no mention of alimony, though the bond does. The consideration of the annuity was, that the plaintiff was to keep the defendant indemnified from all expenses that might accrue on account of his wife, and she was not to have dower out of his estate, which was considerable. He cited 3 *Yeates*, 58. 1 *Bac. Ab.* 494. 8 *Johns.* 72.

The opinion of the Court was delivered by

TILGHMAN C. J.—The question is, whether, under these circumstances, *John Blaker* be liable to the payment of the annuity of sixty dollars. He contends, that he is not liable, because the annuity was in nature of alimony, which, if *decreed*, on a divorce from bed and board, ceases on a divorce from the bond of marriage. The law is certainly so, in case of a decree of divorce and alimony; but it does not follow, that it is so, in case of separation and maintenance by voluntary agreement. The parties may make what agreement they please, and the only question is, what is the agreement. In this case, the articles of agreement, and the

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bond, are to be considered as one transaction. They bear the same date. It is provided by the articles, that the husband shall give security for payment of the annuity, by judgment and mortgage; and the bond with warrant of attorney to confess judgment, was given in performance of the articles. The express agreement was, that the annuity should be paid during the life of the wife, nor is there any intimation to the contrary, except the implication which is attempted to be drawn from the word *alimony* in the condition of the bond. To be sure, alimony, technically, signifies a sum of money paid for the maintenance of a married woman, who is separated from her husband. But the *articles of agreement* have no such word as alimony, nor can I suppose that it was intended to be used technically in the *bond.* The agreement really was, that the husband should pay sixty dollars a year, for the wife's support, *during her life,* in consideration whereof, he was to be indemnified from any further expense, and from any claims of dower. The father was security for this indemnification, so that the husband received a *quid pro quo. Blaker*, it seems, was a man of landed property, and this exemption from dower was an important consideration. He retains all the benefit of this agreement, notwithstanding the subsequent divorce, and marriage of his wife. It does not appear on the record, at whose instance this divorce was obtained, nor what was the cause of it. It may be, that it was caused by the husband's misconduct, and if so, it would be a bad reason for getting rid of the annuity. I will not presume that it was occasioned by the misconduct of the wife, because it is not shewn. There is no doubt that a man may agree to pay an annuity to his wife during his life, whether she remains his wife, or obtains a divorce and marries again. And it appears to me, that in the present case, there has been such an agreement. I am therefore of opinion, that the Judge of the Court of Common Pleas, was right, in charging the jury that the plaintiff was entitled to recover, and the judgment should be affirmed.

Judgment affirmed.

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SHAFFER and another *against* SNYDER.

IN ERROR.

Monday, January 14.

ERROR to the Court of Common Pleas of *Lehigh* county.

The testimony of a witness that he had notice of the dissolution of a partnership at a particular time cannot be given in evidence in a suit between others in which the dissolution of the partnership at that time becomes a material question.

In the Court below *Christian Snyder*, the plaintiff below brought this action on the case against *Christian Shaffer* and *Samuel Solliday:* who pleaded *non assumpsit*, and payment with leave, &c., on which issues were joined.

On the trial it became a material question, whether the partnership of the defendants in a store in *Hellerstown*, was dissolved or not. It appeared from the testimony, that *Christian Shaffer* removed from *Hellerstown* in the spring of the year 1816. The defendants alleged that this partnership was dissolved at that time.

David Heinback was called, and examined on oath in behalf of the plaintiff. On the cross examination, the defendants asked him what his son had told him about the dissolution of the partnership of *Shaffer* and *Solliday*, when he, the son, had returned from *Hellerstown*. The plaintiff objected to this interrogatory, contending that the son himself should be produced. The Court sustained the objection, and no exception was taken to the opinion of the Court as to this matter. The defendants then asked the witness, whether he had not notice of the dissolution of the partnership or firm of *Shaffer & Solliday*, at the time *Shaffer* removed from *Hellerstown*. The plaintiff objected to this interrogatory, contending that the defendants wished to obtain illegal evidence by changing the question. The Court said the interrogatory might be put to the witness in this manner, to wit:—Had you notice of the dissolution of the partnership or firm of *Shaffer & Solliday* at the time *Shaffer* removed from *Hellerstown*, from the defendants or either of them, or not? The defendants refused to put the question as proposed by the Court, but insisted upon putting the question to the wit-

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ness, whether he had not notice of the dissolution of the partnership or firm of *Shaffer & Solliday* at the time *Shaffer* removed from *Hellerstown*? Which question was objected to as aforesaid by the plaintiff, and the objection was sustained by the Court. The defendants thereupon excepted.

Binney, for the plaintiffs in error, cited, 1 *Phill. Ev.* 306.

Scott, contra, cited, *Wats. on Part.* 384. *Peake's N. P. Cas.* 53. 6 *Johns.* 144.

The opinion of the Court, (GIBSON J. being absent,) was delivered by

DUNCAN J.—This is a very narrow question; the case comes up in a nude state; whether the plaintiff below had been a correspondent and dealer with the defendants before the dissolution of their partnership, is not stated. Nor does it appear that the defendants below, plaintiffs in error, offered any evidence of the notoriety of the dissolution in the town and neighbourhood in which they transacted their business, or that *Snyder* resided near to them. The interrogatory rejected was simply this, whether the witness had not notice of the dissolution of the partnership of *Shaffer & Solliday*, at the time *Shaffer* removed from *Hellerstown*?

I do not know that any case has yet been decided in this Court, with respect to the notice of dissolution of partnership. In *England*, notice in the *London Gazette*, is the usual and ordinary mode, as to those who have had no previous dealings, and this has been left to the jury from whence to infer the notice. *Godfrey* v. *Turnbull*, and *M'Cauley*, 1 *Esp. Rep.* 371. In *Connecticut*, advertising in newspapers printed where the partners transacted the business, held evidence of notice of dissolution to every other person, not a correspondent of the company. *Mowatt* v. *Howland and others*, 3 *Day.* 353. So in *New York*, in *Lansing* v. *Gaine & Ten Eyck*, 2 *John. Rep.* 304. 6 *Johns.* 144. *Ketcham & Black* v. *Clark*, public notice must be given in a newspaper of the city and county, where the business was transacted, or public notice must be given in some other way. What notoriety of dissolution might be sufficient to go to a jury as evidence of notice to persons who had no previous dealings with

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the firm, (for to those who had, personal notice seems to be held necessary,) it is not made necessary to decide in this case; for all that the interrogatory overruled could have done, if answered affirmatively, would be to prove that he the witness had notice of the dissolution when *Shaffer* left *Hellerstown*. The offer to prove by one man, that he had notice of the dissolution of partnership, could not be evidence that another had notice. It is the hearsay of one witness, to prove a fact which must be established either by notice in the public papers, or be proved to be so notorious a fact, as that the jury might presume it had reached the parties ear, or the notice must be personal. What evidence is proper to go to a jury to prove notice of a dissolution of partnership, the Court give no opinion; the only opinion they now give is, that this was not proper evidence, and that the Court decided properly in rejecting it.

Judgment affirmed.

STEPHENS *against* GRAHAM and another.

IN ERROR.

January.

A promissory note, of which the date has been altered without the consent of the defendant, the indorser, is thereby rendered void, though in the hands of an innocent indorsee.

The date is in point of law a material part of the note, and it is error for the Court to leave it to the jury, whether the alteration of the date was material or immaterial.

ERROR to the District Court of the city and county of *Philadelphia*, and bill of exceptions to the charge of the Court.

Assumpsit, in the Court below, by *Peter Graham* and *John Graham*, trading under the firm of *Peter Graham* and *Co.*, against *Benjamin Stephens* as indorser of a promissory note drawn by one *John Grant* in favour of and indorsed by *Benjamin Stephens*. The declaration, which contained but one count, stated the note to have been drawn on the 26th day of *July*, 1814, for 150 dollars, payable in six months after date.

On the trial the plaintiffs gave in evidence a promissory

Proof of a note dated the 26th July, does not support a declaration stating a note dated on the 25th July.

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note, drawn by *John Grant* in favour of and indorsed by the defendant for 150 dollars, payable in six months after date; but the date was evidently altered so as to make it the 26th *July*, 1814, and this was admitted by the plaintiffs. But from what date it was altered was not proved; it being alleged by the plaintiffs, that its original date was the 25th *July*, 1814, and by the defendant that the original date was the 21st *July*, 1814. The plaintiffs also proved that they received the note from *Grant* in payment for goods sold, though at what time or how long after it was drawn, the witness on their behalf could not state, but he stated that it was altered when he received it, though he did not remember saying any thing of it. The handwriting of the defendant was admitted.

The presiding Judge of the Court below, charged that the case stood with the plaintiffs on the admission of the indorsement. That the first question was, whether the note was altered with the privity of the defendant, for then he cannot maintain his defence, that it was altered before it came to the plaintiffs. He asked what motive there could be to alter the note: because he said there might be some motive; and whether there could be any motive, if altered from the 25th to the 26th *July*. He directed the jury to inquire whether it was altered from the 21st or 25th to the 26th *July*, and if *Grant* did alter it, then to inquire at what time it was altered. The Court then put it to the jury to say, whether the alteration was material, if made from the 25th *July*, 1814, to the 26th *July*, 1814. That if the jury found the note was altered with the privity of the defendant, then to find for the plaintiffs. That if it was altered from the 21st *July*, 1814, to the 26th *July*, 1814, without the privity of the defendant, to find for the defendant: if altered from the 25th *July*, 1814, to the 26th *July*, 1814, without the privity of the defendant, to find for the defendant, if in their opinion such alteration was material; if immaterial to find for the plaintiffs: and in that case to find the fact specially, and to find from what day the note was altered. To this charge the defendant excepted.

The jury found a verdict for the plaintiffs, for 197 dollars 37 cents, and gave it also as their opinion, that the note,

on which this action was founded, was altered with the knowledge of the defendant. Of this opinion of the jury, an entry was made on the record, returned to this Court with the bill of exceptions.

Keemle, for the plaintiff in error.

Lowber, contra.

The opinion of the Court was delivered by

DUNCAN J.—The defendants in error, plaintiffs below, declared on a promissory note for 150 dollars payable six months after date, drawn by one *John Grant*, and made payable to *Benjamin Stephens*, who indorsed it to the plaintiffs below, and dated on the 26th *July*, 1814. The date was evidently altered, but whether the alteration was from the 21st or the 25th, was not fully in proof. The direction of the Court was a very special one.

It is contended by the defendants in error, that the alteration of the date from the 25th to the 26th, is altogether immaterial, as it became due on *Sunday;* and by the custom of merchants in this city, such note would be considered as payable on the *Saturday* preceding. So that whether payable on the *Saturday* or *Sunday*, the days of grace would be the same, and no injury done. The effect of an alteration of all written instruments is the same. All that are altered or erased in a material part without the parties' consent are vitiated. *Master* v. *Miller*, 4 *T. R.* 320, and 1 *Anstruther*, 225, in the Exchequer Chamber. The contrary opinion of Judge BULLER, as to the difference between deeds and other writings, was opposed by all the other Judges of *Westminster* Hall. Negotiable paper, which passes from hand to hand, was considered by eleven Judges to require greater nicety and circumspection than bonds, which are generally confined to the custody of one person. It cannot be said, that the date forms no part of the bill; nor that it forms an immaterial part. If it were not a material part, the note might not be destroyed, according to *Trapp* v. *Spearman*, 1 *Esp.* 57. It does not depend on the accelerating or extending the day of payment, or increasing or decreasing the sum, but upon the identity; to insure the indentity, and prevent

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the substitution of one instrument for another, (*Sanderson* v. *Symond*, 1 *Brod. & Bing.* 134,) is the foundation of the rule, and it is a wise rule, as it prevents all tampering with written instruments. For though the alteration in an obligation from pounds into dollars, from sterling pounds into current pounds, although such alteration could not do any possible injury to the obligor, still it avoids the bond. So if the sum were lessened. The day on which this note became due, in point of law, was six months after date. The custom of demanding it on *Saturday*, when it becomes due on *Sunday*, has relation to the days of grace, and not to the legal day of payment. The days of grace are gratuitous only, in contemplation of law, though the course of usance at particular places will be taken notice of by the Court. But this would not affect the Statute of Limitations. When would the time begin to run? Certainly from the day on which, by its terms, it became due. Like the time of grace allowed by Courts for special bail to surrender their principal. At law the party is bound, and could not take advantage of a surrender after the return of a *capias ad satisfaciendum*, by pleading. It is by motion to the Court. The cases which have been relied on by the defendants are, where the addition was, most probably, not written under the acceptance, but a memorandum afterwards where to find the accepter, where the bill became due, and no part of the acceptance. If this were not so, according to the opinion of the Court, in *Tidmarsh* v. *Grover*, 1 *Maule & Selw.* 735, they were wrongly decided. The date of the instrument ought to be clearly expressed. If it has no date, then the time will be computed from the day on which it issued. *Chitty on Bills*, 43. The day of the date is excluded in the computation of a bill payable after date. *Chitty*, 138. The best and the safest is the general rule, that where a bill is altered in any material respect, as for instance the date or sum, without consent of the drawer, it will discharge him, although the bill afterwards come into the hands of an innocent indorsee not aware of the change. *Chitty*, 62. But what removes every doubt is, that it is laid in the declaration as given on the 26th, and in every written instrument the day laid is material, and must be proved as laid, where the action is brought on the instrument itself; not where laid under a *videlicet*, and the action is not founded on the writing. 2 *Peake*,

196. Now here the allegation is, that the note was given on the 26th. Proof that it was given on the 21st or 25th, would have been a material variance, and such the defendants in error admitted their case to be. It is not the identical note the party has given. The note here is the only medium by which the plaintiffs could recover. It is through that they derive a right of action. The question is, whether or not the defendant below promised in the form stated in the declaration, and the substance of his plea is, that according to that form he is not bound to pay.

I regret much the necessity of reversing this judgment, because we see that from the opinion of the jury, the question was altogether immaterial, as they found that the alteration was made with the privity of the defendant. Had this been, or could the Court have put it into the shape of, a special verdict, which I have struggled to do, all would be right; but I fear the danger of innovation in favourable cases, and of receiving an opinion of a jury attached to a general verdict as a foundation for converting it into a special verdict. There was, therefore, error in that part of the opinion of the Court directing the jury to find for the plaintiffs, if they found the alteration to be from the 25th to 26th, if in their opinion it was immaterial. It was a question of law, and in my opinion, was such an alteration as, if done without the consent of the drawer, avoided the note; but at all events, as the note was set out as dated on the 26th, proof of its being on the 21st or 25th, did not support the declaration.

Judgment reversed, and a *venire facias de novo* awarded.

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CHEEVER and another *against* IMLAY and others assignees of CLARK.

January.

POINT RESERVED.

Assignment by a debtor to trustees in trust, first, for the payment of specified debts, second, for the payment of all the other debts of the assignor, (except notes and indorsements made by him for the accommodation of others,) in full, if the money be sufficient, if not, then in just and equal proportions; and after paying the said debts of the second class, then thirdly, to pay certain others and if any surplus should remain, then to pay the same to the assignor, his executors, &c., provided, that before payment of any of the said debts, the creditors should release within a certain period. *Held*, that a creditor of the second class who did not release within the period prescribed, was not entitled to a dividend, notwithstanding he executed a release before the assignees had declared or paid a dividend, and a surplus remained after paying the second class of creditors.

THIS cause was tried at *Nisi Prius*, and a verdict was given for the plaintiffs, subject to the opinion of the Court on a point reserved.

The plaintiffs, *Cheever & Fales*, were creditors of *Joseph Clark*, and the defendants were trustees under a deed of assignment made by *Clark* in trust for his creditors. This action was brought for the recovery of a dividend claimed by the plaintiffs out of the estate of *Clark*, in the hands of the defendants. There was no dispute about the amount of the plaintiffs debt, or the amount of the dividend. The only question was, whether the plaintiffs were entitled to any dividend. *Clark's* assignment bore date the 14th *January*, 1818. The trust was, that the defendants should collect all his debts, and convert all his property into money, which was to be applied to the payment of his debts in the following order: *First*, to the payment of certain specified *accommodation notes*, if there should be sufficient to pay the whole of them, but if not, "*then in just and equal proportions.*" *Second*, to the payment "of all the other just debts of the said *Clark*, (except notes and indorsements made by him for the accommodation of others,) in full, if the monies be sufficient, if not, *then in just and equal proportions*; and after paying the said debts of the second class, then, in the *third* place, to the payment of all notes and indorsements made by the said *Clark*, for the accommodation of others, in full, if the monies be sufficient, but if not, *then in just and equal proportions*; and if any surplus should remain, then to pay the same to the said *Clark*, his executors, administrators, or assigns. *Provided, that before the payment of any of the said debts in any of the said classes enumerated or contained, the*

respective creditors do, within sixty days from the date hereof, if they reside in America, and if they reside in Europe or elsewhere, within six months from the date hereof, execute a full and complete release and discharge of their respective debts." The plaintiffs fell within the second class of creditors. They resided in *America*, and did not execute a release within sixty days from the date of the assignment, but they executed a release on the 19th *June*, 1818, at which time the defendants had made no dividend, nor paid any of the money which they had received under the trust. Some creditors within the second class had released within the sixty days. After having paid the first class of creditors, a surplus would remain in the hands of the assignees, and the question was, whether the plaintiffs were entitled to the dividends of it in proportion to their debt.

Binney, for the plaintiffs.

We contend for no principle that will expose the assignees to any loss or inconvenience. The offer of a release was made by the plaintiffs in time to put them on their guard, and they will sustain no mischief by the payment, as they have funds reserved. Nor will creditors suffer a loss. If the dividend had been made when we executed the release, the payment of it could not be disturbed. But that was not the case. Under the circumstances, we contend, that our claim is well founded. The ruling intention of the assignor is to provide for all his creditors, and such is the equity. This construction of the assignment not only favours a *pro rata* payment of the creditors, but is for the benefit of the debtor. A precise term is limited by him as a threat to hasten them to come in, but the paramount object is to bring them all in. If the plaintiffs come in they take nothing from the other creditors: if they are excluded, the dividend of the other creditors is not increased. For, by the assignment, each creditor is to receive only the proportion which his debt bore to the whole amount of debts in his class, whether all the creditors in that class executed a release or not. Then the other creditors are not injured, and the debtor is benefited by being released from a debt that would otherwise be outstanding against him: and the only objection is, that the release was not executed within the time limited by the as-

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signment, an objection merely formal. We are entitled to the benefit of all equitable principles, and it is well settled in equity, that a condition imposed merely *in terrorem*, such as a condition that if *A.* marry without the consent of *B.*, then a legacy bequeathed shall be void, is invalid, if not bequeathed over. The condition here is of the same kind: introduced merely to accelerate the releases. As to the time limited, time is not material where, as here, things stand in all respects the same after as before the day. Relief is often given in equity where the objections are founded on time only. Time is not the essence of a contract in equity; but if no damage be sustained, a contract may be enforced after the time stipulated. Equity will not suffer advantage to be taken of a penalty or forfeiture where compensation can be made. *Gibson* v. *Paterson*, 1 *Atk.* 12. *Sugden*, 244. *Newland on Cont.* 230, 231. 232. 4 *Bro. C. Rep.* 330. *Seton* v. *Shard*, 7 *Vez.* 265. 1 *Fonbl.* 391. 395. *Hayward* v. *Angell*, 1 *Vern.* 222. *Grimston* v. *Bruce*, 1 *Salk.* 156. *Cage* v. *Russell*, 2 *Vent.* 352. *Francis's Max. Eq.* 45. 48. *Wallis* v. *Grimes*, 1 *Ch. Cas.* 89. *Bland* v. *Middleton*, 2 *Ch. Cas.* 11. *Longdale* v. *Longdale*, 1 *Vern.* 456. In the case of *Dunch* v. *Kent*, 1 *Vern.* 260, there was a deed of trust for payment of such creditors as should come in within a year, and it was held, that a creditor would not be excluded though he did not come in till after the year.

Chauncey, contra.

The debtor had a right to prefer what creditors he pleased, and on what terms he pleased. It is clear the plaintiffs are not within the letter of the assignment, and if that be departed from, it is impossible to foresee the consequences that may ensue. It will not always operate in favour of the debtor, and will exceedingly embarrass the settlement of the estate. It is a sufficient answer to the equity set up by the plaintiff, that there were, at the expiration of the time limited, rights vested in the other creditors, and equity will never relieve from non-performance of a condition to the injury of vested rights. The case of *Dunch* v. *Kent*, the only one that at all bears on this case, is unlike, in several particulars. *Lindsey*, the trustee in that case, converted the funds to the use of his own creditors, and it is certain they had

no right to the fund. As to the argument that the other creditors will not be injured, because their proportion remains the same whether the plaintiffs are included or not, this construction cannot be given to the assignment. The proviso contemplates a payment of the whole debts to such as release, if the fund be sufficient: those who do not release, are not to be considered as creditors, and are to have no part in the trust. The assignor is not to have any part till after all the debts are paid; then what is to become of it, if the creditors who release are not entitled to it?

The opinion of the Court was delivered by

TILGHMAN C. J. [After stating the case.]—The counsel for the plaintiffs, who certainly made the most of their cause, argued strenuously that the time fixed for the release, was not an essential circumstance, and that as the release was executed within six months, before the expiration of which the defendants were not authorised to make a dividend, it was highly reasonable that the plaintiffs should be let in, which would be advantageous to *Joseph Clark*, because he would thereby be discharged from their claims. He contended also, that this would be no injury to the other creditors, because, their dividend would not be increased by the exclusion of the plaintiffs, inasmuch as by the true construction of the asssignment, each creditor was to receive no more than the proportion which his debt bore to the whole amount of debts in the class to which he belonged, whether all the creditors in that class executed releases or not. If this be indeed the meaning of the assignment, the plaintiffs will have a strong case; for if the dispute be only between the plaintiffs and *Joseph Clark*, much may be said in favour of an extension of time. But after an attentive examination of the deed, with a strong disposition to let the plaintiffs in for a dividend, if possible, I have not been able to agree with the plaintiffs' counsel in his construction of it. The first class of creditors is no way concerned in this dispute. Those creditors have been all paid, and it is to be presumed the assignor knew that they would be all paid. But in the other classes, a deficiency of estate must have been probable at the time of executing the deed of assignment. The second class has received only thirty-seven and a half per cent. The

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plaintiffs belong to the second class. Suppose then that they are excluded. If the sum which would have been drawn by the plaintiffs in case they had released within sixty days, is not to go to the creditors in that class who did release, what is to become of it? It is said it is to go to *Joseph Clark.* But it is not declared so in the deed; on the contrary, the express trust, with regard to *Clark*, is, that he shall receive the *surplus, if any there be, after paying all the debts in all the classes.* The proviso in the end of the deed, acts with retrospective force on the whole which precedes it; so much so, that a creditor who falls within the scope of it, is considered as a stranger, and excluded from all benefit of the trust. I have never liked these assignments, which operate as a *coercion* on creditors. But I can have no doubt of their meaning. They are calculated to produce speedy releases, by the influence of hope and fear. Some creditors are brought in by the hope of getting a good dividend, because they suppose that many will stand out. And others are induced to take a little through the fear of losing all. The expressions in this deed, applied to each class, are, that if there shall not be monies sufficient to pay their whole debts, then they shall be paid *in just and equal proportions;* that is to say, as I understand it, taking the proviso into consideration, as the fund to be divided, is to the amount of the released debts in any class, so is the debt of any individual in that class, to the dividend he will be entitled to receive. The claim of the plaintiffs therefore, is, in the first place, in opposition to the creditors who have released, in the second class; but if they should receive their whole debts, then in opposition to the succeeding classes respectively; but *Joseph Clark* is not to receive any thing, till all the released debts, in all the classes, have been fully satisfied. The dispute therefore, as to enlarging the time for the plaintiffs release, is not between them and *Clark*, but between them and the other creditors. The claim for extension of time, is founded on equity. But what equity have the plaintiffs against the other creditors? These creditors have executed releases, and have nothing but this fund to look to. I cannot say, that the chances of other creditors standing out, may not have been an inducement to these persons to sign the release. They saw the terms held out by the assignment, and

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had a right to calculate on their strict observance. But if these terms are now varied, the consideration of their release is, in part taken from them. Supposing my construction of the assignment to be the true one, this case is not to be distinguished from *Pearpoint & Lord* v. *Graham*, decided by the Circuit Court of the *United States* for this district, at *April* Term, 1820. There, it was expressly ordered, that the fund should be divided among those creditors who executed releases by a certain day, and the Court decided that the time could not be extended. That was indeed a stronger case than the present, for there the plaintiffs had some excuse for not executing a release in time. The trustee had undertaken to have a release prepared to be signed by the creditors. The plaintiffs called within the time, for the purpose of signing, but the writing was not ready. But in the case before us, no excuse or apology whatever has been offered; no mistake, no inadvertency of any kind, alleged. We must suppose therefore, that the delay was deliberate. Many of the cases cited by the plaintiffs' counsel, were strong, for the purpose intended, that is, to shew that in cases where no injury has been sustained, or compensation can be made for any injury which may have been sustained, time is not generally considered, in equity, an essential part of the contract. But those cases cannot be applied against the releasing creditors, between whom and the plaintiffs there has been no contract. The only case which has any thing like a strong bearing on the present question, is that of *Dunch* v. *Kent*, decided in the year 1684, and reported in 1 *Vern.* 260. 359. The *King*, being indebted to *Colvill*, a banker, in the sum of 84,700*l.*, and *Lindsey*, a bankrupt, having married *Colvill's* widow, the *King*, by letters patent, in consideration of the said debt, granted to *Lindsey* an annual sum issuable out of the hereditary excise, on special trust, that all such of *Colvill's* creditors as would come in within a twelve month, and accept a share of this annual sum, in proportion to their debts, should have the same assigned to them. A creditor of *Colvill's* filed his bill, after the year, to have the benefit of this trust, and complained that *Lindsey* had acted fraudulently, in applying part of the fund to the payment of *his own debts*. It was decreed, that there was a continuing trust for creditors who came in after the year. The case

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is badly reported. It does not appear what the annual sum granted by the *King* was, nor for how many years it was to be, continued. Possibly it might have had continuance long enough to pay all the debts of *Colvill;* and then the extension of time would have been a matter in which nobody but the *King* was concerned. Be that as it may, there appears to have been very little question about extension of time. The main dispute was, between the plaintiff and *Lindsey*, who had committed a fraudulent breach of trust. Nothing is said of any opposition to the plaintiff by those creditors who had come in within the year. Indeed it is not even stated, that any creditors came in within the year. Nor is it said that any creditor was required to execute a release, without receiving his *whole debt.* A good deal of the report is taken up with a subject which does not seem to concern the matter in dispute, that is to say, with what the Solicitor General admitted, as to the right of a trustee for the payment of debts in general, to sell, upon good consideration, and as to the obligation on the purchaser, to look to the payment of the debts. In short, I think it an obscure case,—distinguished however, as far as I can understand it, in many particulars, from the one before us, and by no means of equal weight with *Pearpoint & Lord* v. *Graham.* Upon the whole, I am of opinion, that the plaintiffs have not complied with the terms required by *Joseph Clark's* deed of assignment, and therefore they are not entitled to any part of the dividend in the hands of the defendants.

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Philadelphia.

In the case of the Corporation of St. Mary's Church (Roman Catholic) in the city of Philadelphia on a proposed alteration of its Charter.

THE application made at the last Term, by a portion of the members of the *Roman Catholic Society*, worshiping at *St. Mary's* church, in the city of *Philadelphia*, for certain alterations in their charter having been rejected by the Court, (see 6 *Serg. & Rawle*, 498,) was now renewed under different circumstances. Since the last Term, new trustees were elected, and the proposal for these alterations, which had been adopted on the 9th *July*, 1821, was now made by the trustees, under the corporate seal. The corporation consisted of *eight* lay members, and *three* clerical members: and these amendments were adopted and requested by the Rev. *William Hogan*, pastor, and the eight lay members, but the three clerical members, *Henry Conwell*, bishop, the Rev. *James Cummiskey* and *Samuel Cooper*, stating themselves to be pastors of *St. Mary's* church and trustees, dissented from the amendments, and addressed to the Court a remonstrance against them.

Amendments proposed by a corporation are not to be considered as the Act of the corporation merely because they are offered under the corporate seal; the Court may inquire by what authority it is affixed.

Where the trustees of a corporation consist of three clerical and eight lay members, if one of the clerical members be excluded from the board by a resolution of the lay members, without authority, resolutions for alterations of fundamental articles of the charter in the absence of such member, are unlawful.

The church was originally incorporated on the 13th *September*, 1788, by the following Act of Assembly, entitled an Act to incorporate the members of the religious society of *Roman Catholics* belonging to the congregation of *St. Mary's* church in the city of *Philadelphia:*

Whereas, the members of the religious society of *Roman Catholics*, inhabiting the city and vicinity of *Philadelphia*, and belonging to the congregation worshiping at the church of *St. Mary*, in Fourth street, between Spruce and Walnut streets, in the said city, have requested this house to pass a law, to incorporate them, and enable them to manage the temporalities of their church, as other religious societies within this State have been enabled to do, and it is reasonable to grant their request.

In corporations where there are different classes, the majority of each class must consent, before the charter can be altered, if there be no provision in the charter respecting alterations.

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SECT. I. *Be it therefore enacted, &c.* That the members of the religious society of *Roman Catholics*, inhabiting the city and vicinity of *Philadelphia*, and belonging to the congregation worshipping at the church of *St. Mary's* aforesaid, are, and from and immediately after the passing of this Act, shall be, and they are hereby erected into, and declared to be one body politic and corporate, in deed and in law, by the name, style and title of the "Trustees of the *Roman Catholic Society* worshiping at the church of *St. Mary's*, in the city of *Philadelphia*," and that they, the said trustees, by the name aforesaid, and their successors, to be elected as hereinafter mentioned, shall have perpetual succession, and shall be able and capable in law, to purchase, take, have, hold, receive, and enjoy, to them and their successors, in fee simple, or for any lesser estate, any lands, tenements, rents, hereditaments, or real estate, whose yearly value, in the whole, shall not exceed the sum of five hundred pounds, by grant, gift, bargain and sale, by will, devise, or otherwise, and also to purchase, take, hold, possess, and enjoy, any moneys, goods, and chattels, or personal estate whatsoever, by gift, grant, will, legacy, or bequest, and the same land, tenements, rents, hereditaments, and real and personal estate, (excepting always the said church, called *St. Mary's*, and the lot of ground, graveyard and appurtenances thereto belonging, or therewith now used and occupied, containing in breadth, on Fourth and Fifth streets, sixty-three feet, and in depth three hundred ninety-six feet,) to give, grant, demise, or otherwise dispose of, as to them shall seem meet, for the use of the said religious society; and also that the said trustees, by the name aforesaid, shall be able and capable in law, to sue and be sued, implead and be impleaded, answer and be answered unto, defend and be defended, in any suit or actions, and in all or any Court or jurisdictions whatsoever; and it shall and may be lawful for the said trustees, by the name aforesaid, to devise, make, have, and use, one common seal, to authenticate all and every, their acts, deeds, and instruments, touching their business, and the same at pleasure to break, alter, and renew; and generally, that the said trustees, by the name aforesaid, shall have, hold, and enjoy, all and singular the rights, privileges, liberties, and franchises, incident or belonging to a private or religious corporation or body poli-

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tic, as fully and effectually as any other private or religious corporation or body politic within this State has a right to have, hold, and enjoy the same.

SECT. II. *And it is further enacted, &c.* That the first trustees of the said corporation shall be and consist of the following persons, to wit. The Rev. *Robert Molyneaux*, the Rev. *Francis Beeston*, the Rev. *Lawrence Graessel*, the present pastors of the said church, and *George Meade*, *Thomas Fitzsimons*, *James Byrne*, *Paul Esling*, *John Cottringer*, *Joseph Eck*, *Mark Wilcox*, and *John Carrell*, members of the congregation worshipping in the said church: and the future trustees of the said corporation shall be and consist of the pastors of the said church for the time being, *duly appointed*, not exceeding three in number, and of eight lay members, of the congregation worshipping in the said church, to be appointed and elected in the manner hereinafter mentioned.

SECT. III. *And be it further enacted, &c.* That all and every of the members of the said congregation, (holding a pew or part of a pew in the said church, and paying for the same not less than fifteen shillings by the year, and not being in arrears for the said contribution more than six months,) shall meet on the *Tuesday* of *Easter* week, in the year one thousand seven hundred and eighty-nine, and so in every year for ever thereafter, at such place in the said city as shall be appointed by the said trustees, whereof notice shall be given in the said church, at the close of divine worship, on the morning of the preceding Sunday, and then and there shall choose by ballot the said eight lay trustees, in manner aforesaid, by a majority of those members so *qualified*, who shall so meet between the hours of eleven before noon, and one in the afternoon of every such day, and the trustees so chosen shall continue to be trustees of the said corporation, until the next election; and if the pastors of the said church, *duly appointed*, shall, on any day of such election, exceed the number of three, they shall, among themselves, agree which three of them, the said pastors, shall be trustees for the ensuing year, and shall openly declare, in the presence of all the electors so met at the time of concluding the said election, the names of all the said pastors and members who shall

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be so appointed and chosen trustees of the said corporation, and their names shall be entered in the books of the said corporation, for that purpose to be kept; and the said pastors so appointed, and members so chosen trustees, as aforesaid, shall be and continue trustees of the said corporation, until the close of the next election.

SECT. IV. *And be it further enacted, &c.* That it shall and may be lawful to and for the said trustees and their successors, from time to time, as occasion shall require, to meet together for the purpose of transacting the business of the society under their care; of the time and place of which meeting due notice shall be given to all the said trustees, at least one day before; at which meeting the eldest pastor present shall be president, and if seven of the said trustees shall attend, they shall form a quorum, or board, and shall have power, by a majority of voices present, to make, ordain and establish such rules, orders and regulations, for the management of the temporal business, the government of their schools, and disposing of the estate of the said corporation, as to them shall seem proper. *Provided*, That such rules, orders, and regulations, be *reasonable in themselves*, and not repugnant to the constitution and laws of this State.

On the 20th *March*, 1821, the Legislature passed an Act to authorise the *Roman Catholic Society*, worshipping at the church of *St. Mary's* in *Philadelphia*, to amend their charter of incorporation, which enacted that, "the members of the religious society of *Roman Catholics* inhabiting the city and county of *Philadelphia*, and belonging to the congregation worshipping at the church of *St. Mary's* in the city of *Philadelphia*, incorporated by an Act of Assembly of the State of *Pennsylvania*, passed the 13th day of *September* in the year of our Lord, 1788, by the name, style and title of "The trustees of the *Roman Catholic Society* worshipping at the church of *St. Mary's*," be, and they are hereby empowered to improve, amend and alter the charter of incorporation granted them by the aforesaid Act in the same manner, and with the same privileges and powers as corporations established by virtue of an Act of Assembly passed the 6th day of *April*, in the year of our Lord, 1791, entitled, "An Act to

confer on certain associations of the citizens of this Commonwealth, the powers and immunities of corporations or bodies politic in law."

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From the evidence and documents produced before the Court on the present application, it appeared, that in procuring the adoption of the proposed amendments, the following proceedings took place: An election was held on the 24th *April*, 1821, pursuant to the charter, and the eight lay members now requesting the amendments were elected trustees. At that time there were three pastors, namely, Bishop *Conwell*, the Rev. Mr. *Cummiskey*, and Mr. *Hayden*. The board of trustees met on the 25th of *April*, the day after the election, and these three pastors were present, together with the whole of the eight lay members elected. The Rev. Mr. *Cummiskey* was declared President, and took the chair. At this meeting the lay members entered a protest against the appearance of the bishop or of Mr. *Hayden* at the board, or their participating in the transaction of business, for which they assigned their reasons. They added, "that they do not intend to oppose the continuance of the bishop or of Mr. *Hayden* at their meeting, but they cannot consent to recognise either of them in any official character, or to consider them entitled to exercise any of the functions or privileges of a member." It did not appear that the bishop ever attended the sittings of the board after that meeting; but Mr. *Cummiskey*, against whom no protest was entered, attended and presided at meetings held on the 25th, 26th and 30th *April*, and on the 3d and 8th *May*, being the only pastor present.

A meeting took place on the 14th *May*, at which Mr. *Cummiskey* was present, and also Mr. *Hogan*. In the preamble of a resolution passed by the board, at a meeting on the 28th *May*, it is stated that Mr. *Hogan* "had resumed his station as pastor of the church, and according to seniority took the chair, at the meeting on the 14th *May*, and presided over the board; and the Rev. Mr. *Cummiskey* having also attended that meeting was placed, in order, on the right hand of the President's chair, but thought proper, during the sitting to express his disapprobation and dissatisfaction at being superseded, and afterwards fully confirmed the same by absent-

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ing himself altogether from the board, although several meetings had been held; and had also absented himself from *St. Mary's Church*, and neglected discharging his pastoral functions." It was then resolved, "that the Rev. Mr. *Cummiskey* cannot any longer be considered as a pastor of *St. Mary's Church*, and consequently not a member of the board of trustees of said church, having voluntarily vacated his seat at the said board, and neglected and refused discharging his pastoral duties in the said church." At this meeting no pastor was present, and Mr. *Cummiskey* having been served with a copy of the resolution never afterwards attended. The resolution for making the alterations in the charter, now proposed, was passed at a meeting held the 9th *July*, 1821, at which were present, the Rev. Mr. *Hogan*, and no other clergyman, and seven lay members.

It further appeared that *Henry Conwell* was on the 26th *November*, 1819, appointed bishop of the see of *Philadelphia*, and pastor of the same, by a bull under the seal of Pope *Pius* VII.: committing to him the care of both its spiritual and temporal affairs; and that the appointment of pastors was in the bishop alone, or some one delegated by him; and evidence was given, that he possessed the authority to withdraw their faculties. Whether, by the law of the *Roman Catholic Church*, the bishop could withdraw or suspend the faculties of a pastor without a hearing or trial, was a point on which the parties differed. It also appeared that *William Hogan* had been pastor of this church, but on the 12th *December*, 1820, his faculties were withdrawn by the bishop. In the spring of 1821, he was placed again in the church by the trustees, and officiated as pastor; after which he was excommunicated by the bishop, according to the forms of the *Roman Catholic Church*. One portion of the congregation continued to worship at *St. Mary's*, while the other withdrew to *St. Joseph's*, another place of worship.

As to the property of the church and lot, the following facts appeared. On the 23d *January*, 1760, *Daniel Swan* and others, in whom the lot on which *St. Mary's Church* stands, was legally vested, made a declaration of trust in favour of the

members in unity with the congregation. On the 23d *May*, 1763, *Daniel Swan* and others, by deed, conveyed to the Reverend *Robert Harding* in fee, the same part of the lot, "for him to build and erect a chapel thereon." On the 25th *May*, 1793, *Daniel Eddy* and wife, conveyed to the corporation a lot adjoining *St. Mary's* church: and on the 6th *April*, 1821, *Richard Bache* and wife, conveyed to the same another adjoining lot.

Some evidence was given, that the church was built by subscription: and that the Reverend Mr. *Harding* was much the largest subscriber to the building. But the subscription list was not produced, nor did it appear to be in existence. Much parol evidence was given on other matters which do not appear to be material to the points decided by the Court.

The following were the alterations to the charter, to which the sanction of the Court was now requested:

1. That the future trustees of *St. Mary's* church shall only consist of eleven lay members of said congregation, who shall be freeholders and citizens of the *United States*, and of the Commonwealth of *Pennsylvania*, and who shall be competent to organise themselves, and have all the powers and privileges possessed and exercised by the trustees appointed and elected under the original acts of incorporation; *Provided*, That whoever of their number may be appointed treasurer, shall be required to give sufficient security for the faithful discharge of his duties.

2. That the time of holding the election for said trustees, shall be on the first *Monday* of *January* in every year. The first election to be holden on the first *Monday* of *January*, 1822, between the hours of eleven A. M., and four P. M., until which time the following named persons, qualified as aforesaid, shall be trustees, to wit: *John Leamy*, *John Ashly*, *Lewis Clapier*, *Richard W. Meade*, *Joseph Dugan*, *Timothy Desmond*, *John Doyle*, *John Dempsey*, *Patrick Connell*, *Augustine Fagan*, and *Joseph Strahan*, whose duty it shall

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be to elect from the members of said congregation, qualified as aforesaid, such person or persons as may be necessary to supply any vacancy in their number occasioned by any cause whatever, and it shall be competent to any seven of said trustees to form a quorum or board for transacting the affairs of said society, any thing in the aforesaid Act of Incorporation contained to the contrary notwithstanding.

The application for the amendments was now argued by *J. R. Ingersoll* and *C. J. Ingersoll*, in their favour, and *Chauncey* and *Hopkinson*, against them.

Arguments against the amendments.

On the application at the last Term, all that the Court decided, was, that they would not consider the amendments without the application of the corporation. In the present decision, the proceedings at *Washington Hall* are not to be taken into view, because there is no evidence on that subject. And as to the election of trustees favourable to the amendments, it is no test of the sense of the congregation. The party opposed to them withdrew, because they apprehended improper transfers of the seats in the pews would take place, which would defeat a fair expression of sentiment at the election. It is not asserted that this was done: but only that it was a ground of apprehension. It appears that nearly an equal portion of pewholders and congregation are for and against these amendments. The corporate seal is of no importance, because the question still remains to be determined, whether the seal was lawfully used for the present purpose.

Every religious society in *Pennsylvania* is deeply interested in the principles involved in this cause. The attempt is novel: it is to alter the fundamental articles of a charter at the request of part of the members. Say that even a majority request it, it is doubtful whether every member must not assent, and here the members of the congregation are incorporated by the Act of 1788, and constitute the society. If even the trustees be considered as the corporation, they are trustees for the congregation: they are empowered to do the business of the society, but not to make or recommend alterations of the charter. To procure an incorpora-

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tion, under the Act of 1791, the persons incorporated sign the charter: the same thing should be done when an amendment is desired.

The Act of 1788, being a special Act, the general incorporating Act of 1791, did not extend to it, as it embraces only corporations erected under its authority. The Act of 1821, authorises the members of the society to apply for amendments, not the corporation.

If the Act of 1821, be construed so as to authorise the trustees to apply for amendments, the Court are to decide under the Act of 1791, that the amendments are lawful. Now amendments revoking or impairing the charter, are not lawful: nor had the Legislature itself power to pass such an act. *Case of Dartmouth College*, 4 *Wheat.* 518. 2 *Mass. Rep.* 146. This Act, therefore, should be construed so as not to violate the charter. It could not have been intended to give power to a majority to make an alteration materially affecting the interests of the whole. The principle of a majority is never so applied as to affect the rights of individuals.

But if there be a power in the majority to alter the charter, it must be a majority of each *integral* part of the corporation, where the corporation consists of distinct integral parts. By the charter of 1788, the board of trustees consists of two integral parts, clergy and laity. The latter consisting of eight members elected by the congregation, the former of the pastors duly appointed, not exceeding three. The charter contemplates the presence of two pastors at the board, because it says, "the *eldest* pastor present shall be president." There never has been a board before this dispute, when one pastor was not present, except once or twice, when the salary of the clergy was to be settled.

Mr. *Hogan* could not be considered as a regular pastor, because his faculties were withdrawn by the bishop, and before the present amendments were adopted, he was excommunicated. Whether this withdrawal and excommunication were regular or not, this Court cannot judge. He has not appealed. No priest can exercise pastoral duties in *Pennsylvania*, without the authority of the bishop. *Add. Rep.* 302. This country is considered in the view of the Holy See, as a missionary country: and bishop *Carroll*, always gave com-

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missions as pastor, to hold till revoked. All the evidence shews that the bishop had power to withdraw Mr. *Hogan's* faculties in his diocess; so that he could not remain pastor of this church. Even supposing him a legal pastor, there were others whose assent had not been given. He was but one and could not make a majority: and even all three could not relinquish the rights of the clergy in this corporation.

Further, the evidence fully shews, that the clerical trustees were excluded from the meetings of the board, by the lay members; which of itself would invalidate all their proceedings, in adopting the amendments. The bishop is a pastor of *St. Mary's*. It is his cathedral. A vote was passed fixing his salary as pastor. Yet on the day after the election, the lay trustees protested against the appearance at the board of the bishop and Mr. *Hayden:* though they said they should not oppose their continuance at their meeting, yet they declared they could not recognise them as pastors. Their reasons were assigned. *First*, they were not declared pastors immediately after the election. But, there was no occasion to do this, because there were but three pastors, (excluding Mr. *Hogan*, who could no longer be considered such.) *Second*, they were not citizens of the *United States*. But a trustee need not be a citizen, otherwise it would not have been made one of the amendments. *Third*, that they were not pastors; and *Fourth*, that they were not duly elected members of the board. These reasons have no weight. If the bishop and Mr. *Hayden* were not pastors, how could Mr. *Hogan* be? His name was not declared at the time of the election. Thus the bishop and Mr. *Hayden* were in fact expelled: the name of protest does not alter the nature of the thing. Although, a minority, (if not considered as an integral part,) yet they had a right to be present and to be heard at the meetings. They might still have had an influence. A minority not heard, is not bound.

But on the 28th of *May*, Mr. *Cummiskey* was absolutely expelled, and for this there is no sufficient reason or excuse. He probably thought it his duty not to attend as pastor of a church from which the bishop was excluded. But, he never forfeited his rights: and the act of expulsion was unauthorised. He had then been absent from only three meetings.

Arguments for the amendments.

In the nature of things, amendments of charters must, in the progress of time, become useful and necessary: and a power must exist somewhere to apply a remedy. The Act of 1821, vests the power fully in the congregation. And if the board of trustees and a majority of the corporation concur, what more can be required? This Court at the last Term decided, that the will of the corporation should be made known by the corporate body, under their common seal. This is now done. This is also declared to be the will of the congregation, by the result of the last election for trustees, by the voice of a majority. So that their desire is expressed in the clearest and fullest manner.

The only objection of any weight now made is that an integral part of the corporation was wanting when the seal was put to the petition, *viz.* the pastors or clerical members. But we deny that they form an integral or distinct portion of the corporation. By the charter of 1788, the trustees are to consist of the pastors for the time being, and of eight lay-members: and of these seven form a quorum or board, and have power to transact the corporate affairs. They sit together like the peers and bishops in the house of lords in *England*, in which a bill becomes a law if passed by a majority, though no bishop be present. The charter does not declare the pastors to be an integral part: nor is there any reason why they should be; they are to attend to the spiritualities of the church, but in the business of the corporation, they rank as ordinary trustees, and are merged in the whole body. Here seven lay members have signed the petition.

If the presence of a pastor were necessary, there was one—*William Hogan*—who was present, and signed the petition. It is said his functions were withdrawn. This was done without a hearing, and contrary, as we contend, to the laws of the *Roman Catholic Church*. But granting that his faculties were suspended, this did not take away his civil rights—his rights as trustee. The pastor *de facto*, is all this Court can notice on this question A corporation is bound by the acts of a mayor, *de facto*, 1 *Kyd on Corp.* 312. The infallibility or supremacy of the Pope can never be recognised

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in this country, nor is the ecclesiastical law the law of the land.

As to the alleged exclusion of the pastors, it is not true in point of fact. Nothing was done but to protest against their sitting. If there was an exclusion, it was a voluntary one; and they might have attended after the protest if they had chosen. A protest is, in its nature, a submission to the acts which are done, but an assertion of the dissent of the protesters. There was no force, menace, or artifice. There was no protest against Mr. *Cummiskey*, and he attended for some time, and presided. But, at length, he absented himself also; which shews that the clergy were determined to be absent in order to defeat the amendments.

TILGHMAN C. J.—"The trustees of the *Roman Catholic Society* worshipping at the church of *St. Mary*," have proposed certain alterations of their charter, the lawfulness of which has been submitted to this Court, by virtue of an Act of Assembly passed the 18th of *March* last. This corporation was instituted by an Act of Assembly passed the 13th of *September*, 1788, and consequently was not authorised to procure an amendment of its charter under the general provisions of the Act of 6th *April*, 1791, entitled an Act to confer on certain associations of the citizens of this Commonwealth, the powers and immunities of corporations of bodies politic in law. It was necessary, therefore, to resort to the supreme power of the Legislature, by whose authority expressed in the Act of 20th *March*, 1821, this religious society was empowered to improve, amend, and alter the charter of incorporation granted by the Act of 13th *September*, 1788, in the same manner, and with the same privileges and powers, as corporations established by virtue of the Act of 6th *April*, 1791.

We must examine the last mentioned Act, therefore, in order to understand what is our authority and what our duty on the present occasion. And on reference to it, we find, that in the first place it authorises any number of persons, citizens of this Commonwealth, who have associated themselves for any literary, charitable, or religious purpose, to acquire the rights of a corporation, on such terms and condi-

tions as they may think proper, provided the instrument of incorporation be submitted, first to the Attorney General, and afterwards to the Court, and both express their opinion in writing, "that the objects, articles and conditions, therein set forth and contained, are lawful." It is then provided, by the 2d section, "*that as often as the corporations established by virtue of that Act, and the successors thereof respectively should be desirous of improving, amending or altering, the articles and conditions of the instrument upon which they were respectively formed and established, it should be lawful for such corporations respectively, in like manner, to specify the improvements, amendments or alterations which should be desired, and the same to present to the Attorney General and Supreme Court, who should in like manner certify their opinion, touching the lawfulness of such improvements, amendments and alterations.*"

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On applications for *amendments* under this Act of Assembly, difficulties may arise, which do not seem to have entered into the contemplation of the Legislature. When a society wishes to be incorporated, an instrument is prepared, and signed by the members of the society individually, so that the unanimous desire of the signers appears clearly to the Court. But when alterations are proposed, the case is different. It is scarcely possible to prove that every *individual* who has rights or privileges under the charter, has assented to the alterations. And yet the expressions of the Act are, that it shall be lawful for the said corporations *in like manner* to specify the improvements, &c. This is all very well, and every thing goes on smoothly, while there is no difference of opinion in the members of the corporation. But suppose there should be a difference, and that what is proposed by one party, should be objected to by the other.

A difficulty of that kind arose, when many of the members of the religious society of *St. Mary's*, in their individual capacity, applied to the Court for an alteration of their charter, at the last *March* Term, and were opposed by the trustees in their corporate capacity. The Court then decided, that it was not authorised to certify its opinion, touching the lawfulness of the proposed alteration, because the proposal did not come from the trustees, in whom were vested the corporate powers of its society. The reasons which induced the

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Court to come to that conclusion, appear in the opinion which was then delivered, and it is unnecessary to repeat them.

Since the last Term, new trustees have been elected, who differ in sentiment from their predecessors, and now the proposal for alteration comes from the trustees, under the seal of the charter. But another difficulty has started up. This corporation consists of eight lay, and three clerical members. The laity are for an alteration, but the clergy dissent. What is to be done in this predicament? Is the Court bound to consider the proposal for alteration of the charter as the act of the corporation, because it is presented under the corporate seal; or may it look beyond the seal, and inquire in what manner, and by what authority it was affixed? Undoubtedly it may and it ought. Suppose amendments should be voted at a meeting of the corporation, not lawfully convened, and some of the members who were absent, should dissent. Suppose a meeting lawfully convened, and then the majority should force the minority to retire, after which they should pass a resolution for amendments. Suppose, by the constitution of the corporation, a certain quorum should be required to do business, and a number less than the quorum should pass resolutions for amendment, and affix the seal. Or suppose the constitution provided that the assent of certain members should be necessary, and the others proceeded to act without their assent. In all these cases, it is too clear to admit of argument, that the Court would do flagrant injustice, if it suffered the seal to preclude an examination of the truth.

In the case before us, irregularities are complained of, and the power of the lay members to propose amendments, altering the fundamental principles of the charter, against the will of the clergy, is denied. It will be necessary therefore, to analyse the charter, to consider the power possessed by the different members, and examine how that power has been exercised. But I will previously remark, that should the rights intended to be secured to any persons, by the charter under consideration, be affected by the proposed alteration, the Act of Assembly, by virtue of which we now sit in judgment, should be liberally construed for the protection of those persons. For the people of the *United States*, and of this Commonwealth in particular, have shewn a high regard

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for chartered rights. One of the grievances set forth in our declaration of independence was, that the king *took away our charter*, and in the case of "*The College, Academy, and Charity School of the city of Philadelphia*," the Legislature of *Pennsylvania* set a memorable example of good faith and integrity. During the heat of the revolutionary war, the charter of the college was prostrated by an Act of Assembly passed the 27th *November*, 1779, for an alleged breach of charter committed in the year 1764. It is worthy of observation, that the Legislature which passed this Act, was friendly to learning, and though it destroyed the college, erected in its place, a seminary founded on a larger plan and calculated to be more extensively useful, on which it conferred valuable endowments. Nevertheless, when the warmth which probably occasioned the destruction of the college, had subsided, and the people had time to reflect calmly on the injustice of taking away a charter, *without trial*, the Act of 1779, so far as it affected the college, was repealed, with strong expressions of disapprobation.

To return to the charter in question, which bears date the 13th *September*, 1788. It is to be observed that so long ago as the 23d *January*, 1760, the legal estate of the lot on which *St. Mary's Church* now stands, was vested in *Daniel Swan* and others, *in trust for the members in unity with the Roman Catholic congregation.* This appears by the declaration of trust of *Swan* and others—and it is presumed that this property has been legally vested in the present corporation, (although no deed of conveyance appears to have been given in evidence,) because it is mentioned in the charter. Between the years 1763 and 1770, *St. Mary's Church* was built, and since the year 1800, it has been much enlarged. The expense of these buildings was defrayed by individual subscriptions, and it is supposed that the ground was purchased in the same manner. It is in evidence also, that the clergy were not backward in contributing. The Act of Incorporation, after a recital that the members of the religious society of *Roman Catholics*, inhabiting the city and vicinity of *Philadelphia*, and belonging to the congregation worshipping at the church of *St. Mary*, had requested the Legislature to pass a law to incorporate them, and enable them to manage the temporalities of their church as other religious societies

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had been enabled to do, proceeds to incorporate them by the name of "The trustees of the *Roman Catholic Society*, worshipping at the church of *St. Mary*, in the city of *Philadelphia*," and authorises the trustees to lease, sell, or otherwise dispose of, the real estate of the corporation, *except the church called St. Mary's, and the lot of ground, grave yard and appurtenances thereto belonging.* The Act then appoints three priests, (then pastors of the church,) and eight laymen, as the *first trustees*, and declares that the *future trustees* shall be and consist of "the pastors of the church for the time being, *duly appointed*, not exceeding three in number, and of eight lay-members, of the congregation worshipping at the said church, to be appointed and elected in the manner therein directed." The manner of appointing and electing is afterwards directed, as follows.

The lay members are to be chosen by ballot, and "every member of the congregation holding a pew, or part of a pew in the church, and paying for the same not less than fifteen shillings by the year, and not being in arrears for the said contribution more than six months, is entitled to a vote." The election is to be decided by a majority of the votes thus qualified. It is to be annual, and the lay trustees thus chosen, are to continue to be trustees until the next election.—"And if the pastors of the said church, duly appointed, shall, on any day of such election, exceed the number of three, they shall, among themselves, agree, which three of them shall be trustees for the ensuing year, and shall openly declare, in the presence of all the electors so met, at the time of concluding the said election, the names of all the said trustees and members, who shall be so appointed and chosen trustees of the said corporation, and their names shall be entered on the books of the said corporation, for that purpose to be kept, and the said trustees so appointed, and members so chosen trustees as aforesaid, shall be and continue trustees until the close of the next election." These trustees and their successors, are to meet from time to time, and transact the business of the society, "of the time and place of which meeting, due notice shall be given to all the trustees, at least one day before, at which meeting *the eldest pastor present shall be president*, and if seven of the said trustees shall attend, they shall form a quorum or board, and

shall have power, by a majority of voices present, to make, ordain, and establish such rules, orders and regulations for the management of the temporal business, the government of their schools, and disposing of the estate of the said corporation, as to them shall seem proper."

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This is the substance of the charter—Let us now see what proceedings have been had, in order to procure the proposed alteration.

The election of the present trustees took place on the 24th of *April*, 1821. At that time there appear to have been three pastors; the Right Rev. *Bishop Conwell*, and the Rev. Mr. *Cummiskey*, and Mr. *Hayden*. The board met the day after the election, present the three pastors before mentioned and all the eight lay members. The Rev. Mr. *Cummiskey* was declared President and took the chair. At that meeting the lay members entered a protest against the appearance of the bishop, or of Mr. *Hayden* at the board, or their participating in the transaction of business, for which they assigned their reasons. They add, "that they do not intend to oppose the continuance of the bishop or of the Rev. Mr. *Hayden* at their meeting, but they cannot consent to recognise either of them, in any official character, or consider them entitled to exercise any of the functions or privileges of a member."—It does not appear that the bishop ever attended the sittings of the board after that meeting, but the Rev. Mr. *Cummiskey*, against whom no protest was entered, attended and presided at meetings held on the 25th, 26th, and 30th of *April*, and on the 3d and 8th of *May*, being the only pastor present. He was present too at a meeting on the 14th of *May*, at which was also present Mr. *Hogan*, a *Roman Catholic* priest, whose faculties had been withdrawn by the bishop on the 12th of *December*, 1820, and had not been restored to him.

It is stated in the preamble of a resolution passed by the board, at a meeting on the 28th of *May*, that the Rev. Mr. *Hogan* "had resumed his station as pastor of the church, and according to seniority took the chair, at the meeting on the 14th of *May*, and presided over the board, and the Rev. Mr. *Cummiskey*, having also attended that meeting, was placed in order, on the right hand of the president's chair, but thought proper, during the sitting, to express his disapprobation and dissatisfaction at being superseded, and after-

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wards fully confirmed the same by absenting himself altogether from the board, although several meetings had been held, and had also absented himself from *St. Mary's Church*, and neglected discharging his pastoral functions"—after this preamble it was resolved "that the Rev. Mr. *Cummiskey* cannot any longer be considered as a pastor of *St. Mary's Church*, and consequently not a member of the board of trustees of said church, having voluntarily vacated his seat at the said board, and neglected and refused discharging his pastoral duties in the said church." At this meeting no pastor was present, and Mr. *Cummiskey*, having been served with a copy of the resolution, never afterwards attended.

The resolution for making the alterations in the charter, which are now submitted to the Court, was passed at a meeting held the 9th of *July*, 1821, at which were present the Rev. Mr. *Hogan*, (and no other clergyman,) and seven lay members. Before this meeting Mr. *Hogan* had been excommunicated by the bishop. The counsel for the lay-trustees have denied the right of the bishop to excommunicate Mr. *Hogan*, or even to withdraw his faculties, without trial, and on this subject there was much learned argument on both sides. But I shall give no opinion on this point, because I think it unnecessary, and therefore improper, as Mr. *Hogan* is not personally before the Court, and especially as proceedings in nature of *quo warranto* have been commenced against him, to try the right by which he claims to exercise the office of a trustee of *St. Mary's Church*. In my view of the case, it is immaterial whether Mr. *Hogan* was a lawful pastor or not, because even though he were, yet he was not the sole pastor: and if there were other pastors who were unlawfully excluded from the sittings of the board of trustees, by the lay-members, at the time when the resolution for the alteration of the charter was passed, their proceedings cannot be valid.

That there was such an unlawful exclusion of at least one pastor, (the Rev. Mr. *Cummiskey*,) I can have no doubt. As to the protest against the bishop and Mr. *Hayden*, it is contended that it was no exclusion, but only a denial of their rights to sit as trustees, to which they were not obliged to pay any regard. It is said, too, that there was no intention to exclude them forcibly, and it may be so. It must be con-

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fessed, however, that these gentlemen were placed in a very delicate situation. Considering the nature of their offices, decency forbad their entering into warm altercations with the laity, and there are some expressions in the protest, ("*that there was no intention to oppose their continuance at that meeting,*") which rendered it rather doubtful, what treatment they might expect, if they appeared at another meeting. I give no opinion on this part of the case, and shall confine my observation to the exclusion of Mr. *Cummiskey* only.

It was not denied, that he was a pastor *duly appointed*, as I think it was not asserted, that the lay members of this society had ever before exercised, or even claimed, the right of *appointing* or *removing* a pastor. When the charter speaks of pastors *duly appointed*, it refers to the rules and discipline of the *Roman Catholic Church*. Something was said, in the argument, of the danger of a foreign head of an *American* Church. But, our laws have expressed no apprehension of any such danger: and, if our *Roman Catholic* brethren do, in their conscience, believe, that the power of *conferring*, or of *withdrawing* the sacred rights of the clergy has been handed down, in sure succession from the holy Apostle *St. Peter*, to the present pontiff, *Pius* VII. the people of the *United States of America*, have seen nothing in this belief, either criminal, or dangerous to civil liberty. Neither has it been remarked, that during our revolutionary struggle, or on any trying occasion since, the members of that church have been less patriotic than their fellow christians of other denominations. Their priests, therefore, are entitled to, and will receive the same protection as other clergy.

Questions, concerning the rights of the *Presbyterian* clergy, have several times come before this Court, particularly in the cases of *M'Millan* (in error,) v. *Birch*, 1 *Bin.* 178. and *Riddle &c.* v. *Stephens*, 2 *Serg. & Rawle*, 537. In the latter case, these were my expressions, and I adhere to them. —"Every church has a discipline of its own. It is necessary that it should be so, because, without rules and discipline, no body composed of numerous individuals, can be governed. But this discipline is confined to *spiritual affairs*. It operates on the *mind* and *conscience*, without pretending to *temporal authority*. No member of the church can be fined or imprisoned. But, be he minister or layman, he may be ad-

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monished, reproved, and finally ejected from the society. So may he retire from it at his own free will. Under these restrictions, religious discipline may do much good, without infringing civil liberty." And in the same case, it was the opinion of the Court, that, according to the laws of the *Presbyterian Church*, it was not in the power of the congregation to remove their minister; but that the Presbytery alone could do it with a right of appeal, first to the Synod, and in the last resort, to the General Assembly.

From all the evidence which we have had of the rules of the *Roman Catholic Church*, the lay members cannot remove their pastor. How was it then, that Mr. *Cummiskey* ceased to be a pastor of *St. Mary's Church*, or by what authority did the lay-members of the corporation declare, that he had forfeited his office of trustee, which belonged to him *ex-officio*, if he remained pastor? The reason assigned is, that he had absented himself from the meetings of the corporation, and neglected his duty as pastor. For neglect of pastoral duty, they had no right to condemn, or even to try him; and as to declining to attend a few meetings of the corporation, that surely could not amount to a forfeiture of his trusteeship. He was never called on to explain or justify his conduct—no charge was exhibited against him—he never resigned his office—but on the principle of an *implied* resignation, he was expelled from the board. In this proceeding, the respectable gentlemen who compose the lay part of the corporation, (and I know that among them there are men truly respectable,) certainly went too far. In so important a business as an alteration of *fundamental articles*, not only has every member a right to be present, but every member should have explicit notice, that the subject of amendment was to be acted on. I am decidedly of opinion, therefore, that the resolution in favour of an alteration of this charter, passed in the absence of Mr. *Cummiskey*, was unlawful.

Here I might stop. But another question of much importance to the peace of this society, has been brought forward, and wishing sincerely for its peace, I think it my duty to give an opinion on it. Suppose the three pastors to be present, and a vote in favour of amendment to be carried by the lay members who make a majority of the board, the pastors dissenting and protesting against it, would that be a case, in

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which this Court ought to sanction the amendments? In considering this question, I shall avoid all technical and nice distinctions, and endeavour to ascertain the real nature and intent of the charter. It is to be presumed that the Act of Assembly, which incorporates this religious society, was drawn in conformity to their desire, and the structure of the corporation plainly shows, that the greatest harmony and confidence subsisted between the laity and their pastors. The laity were to elect eight members, to whom were to be added their pastors for the time being, not exceeding three in number, *duly appointed;* that is appointed according to the rules of the *Roman Catholic Church*. These eleven trustees were to meet together, with power to transact all the temporal business of the church, *seven* made a quorum, and all questions were to be decided by a majority of voices present. But it was provided, that the oldest pastor present should preside.

We have here, then, two distinct classes of people, each deriving its power from a source different from and independent of the other. The laity being by far the most numerous part of the society, were entitled to a majority in the corporation, and they had it. But the clergy, though fewer in number, were entrusted with a degree of power, which if prudently exerted, would always give them sufficient influence. No provision was made for an *alteration of their charter*, because no alteration was intended. It by no means follows, therefore, that a majority of the whole number of trustees can alter the charter, because a majority could manage the ordinary business of the society—and this will be more evident, when we consider the nature of one of the alterations now proposed, which is nothing less, than to strike the whole body of clergy out of the charter—to annihilate them. How can it be supposed, that any thing like this was in the contemplation of those persons who may be called the *founders* of this church; those who purchased the ground and built the chapel? Having taken such anxious care to place their pastors in a reputable situation in the body corporate, can it be imagined that they intended to leave it in the power of their successors to expel them? And if it was not so intended, how can it now be done?

I grant, that if the clergy had consented; if even a majori-

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ty of the clerical trustees had consented, there would be no good objection to the alteration. Because, although the charter does not provide for it, yet, in the nature of things, it must be supposed that all human institutions may in the course of time require alteration. And when the question for alteration comes on, there is no rule so convenient as to decide by a majority. That is the rule of the common law, applied to corporations—The civil law requires two thirds. I agree therefore, that in corporations where there is no distinction of classes, a majority of the whole corporation would be sufficient. But where there are different classes, the majority of each class should consent, before the charter can be altered.

I have mentioned before, that the Act of *March*, 1821, authorising this society to alter their charter, referred them to the Act of *April*, 1791, for the mode of doing it; and I have also said, that the Act of *April*, 1791, does not seem to have contemplated a difference of opinion in the corporation, with respect to the propriety of the alteration, because it has made no express provision for such a case. We must therefore act upon such principles as best suit the nature of the case. Had it not been, that the clergy exist as a distinct body of men, in this corporation, I should be for certifying the opinion of the Court, in favour of the amendments or alterations, required by the majority, at a meeting regularly convened. But as the case is, I think there should be a majority of both classes. I cannot believe that the Legislature would have acted on any other principle, or that it intended to vest this Court with power to act on any other principle. For the clergy have valuable rights secured by this charter, the right of taking part in the management of those funds, from which their support is derived. These are rights of which the law takes notice, and which the Courts are bound to protect. On these conditions was the charter prayed for, and accepted, and no one is authorised to say, that it would have been accepted on other conditions. The clergy and laity were both before the Legislature, and both were parties to the grant of incorporation.

But the laity have no cause for alarm, should no alteration of charter take place—should the clergy be so imprudent as to throw unreasonable impediments in their way, they may

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always put them down by a vote of 8 to 3. Such is the power of the lay members, that if exercised with prudence and moderation, it will ensure the accomplishment of all reasonable plans. But if matters are pushed to extremity, great difficulties may arise. The lay part of this congregation is greatly divided, though the majority appears to be with the present trustees. But if such measures should be taken, with regard to the employment of pastors, as are incompatible with the fundamental principles of the *Roman Catholic Church*, it may be a serious question what is to become of the real property of the corporation. From what has appeared to the Court, the ground on which the chapel stands, is held in trust for a *Roman Catholic* congregation. The site of the old chapel, (which has been enlarged,) was conveyed to the Rev. Mr. *Harding*, in fee simple, in the year 1763, "*for him to build and erect a chapel thereon*," (these are the expressions of the deed;) whether there has been a formal conveyance from him or his heirs, to the corporation, I know not. It appears however that it was supposed to be held in trust for this society, because the charter provides that the trustees shall have no power to claim it. But the charter was granted to a religious society of *Roman Catholics*, and before the charter, the ground and chapel was held in trust for a religious society of *Roman Catholics*. Now if a majority of this congregation should insist on employing pastors, contrary to the rules of the church, and the minority should choose to persist in remaining *strict Roman Catholics*, in the sense of the word at the time of their incorporation, what is to become of the chapel and ground adjoining? That is a momentous question, on which I have not formed an opinion —but I mention it, in order to shew this congregation, that there are cogent reasons for reconciliation. On both sides of their unfortunate division, are found men of the most respectable character, on both sides there probably have been faults, and with the exertion of that christian charity, which is incumbent on both, there may yet be a re-union. As my opinion on the matter of law submitted to the Court, is in favour of the pastors of this church, these reverend gentlemen may, perhaps, not think me going out of my way, when I offer a few words for their consideration. It is scarcely possible that the *Roman Catholics* of the *United States of*

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America, should not imbibe some of that spirit of religious freedom which is diffused throughout the country. If those who govern that church, exercise their power with great moderation; if they are not too forward in assuming the direction of temporal affairs; if they consult the reasonable desires of the laity both in the *appointment*, and the *removal* of pastors, in all human probability they may long retain their dominion. But if things are carried with a high hand—if, trusting to the authority of the church, they disregard the wishes of their congregations, it is easy to foresee how the matter will end. That church possesses neither property nor temporal power in this country. The laity have both. In a struggle, therefore, between the two orders, the issue cannot be doubtful.

With respect to the proposed alterations of the charter, I am of opinion, that under the circumstances of the case, the Judges of this Court ought not to certify that they are lawful.

Gibson J.—We all concur that the congregation can signify its assent to an alteration of the charter, only through the trustees, who, for that purpose, are the corporate organ of its will. This holds with peculiar force in regard to bodies which associated under and were incorporated pursuant to the Act of 1791, which directs that "it may be lawful for such *corporations* respectively to specify the improvements that may be desired." Those associations must be taken to have been formed on all the conditions and limitations of the Act, which therefore, are to be considered as conditions and limitations of the agreement between the original associates: and it is always an implied article, that the act of the *government* of the corporation, if fairly obtained, shall be sufficient evidence of the assent of all to the alterations proposed. It is said, however, that the trustees of *this* congregation which was incorporated by a special Act before 1791, are its corporate organ only for the transaction of its ordinary business, and not for the expression of its will in regard to the alteration of a fundamental article of its constitution. I perceive no such restriction. In the preamble, it is said, the members of the congregation had desired to be incorporated "to enable them to manage the temporalities of

the church as other religious societies within this State have been enabled to do ;" and the 4th section declares that it shall be lawful for the trustees to meet together to transact "*the business of the society under their care :*" that is, as I understand it, the temporal business, to which alone their authority extends ; but then it must mean *all* temporal business without distinction as to what is ordinary and what extraordinary ; for alterations of the charter may be a necessary business, touching the interests of every corporation as nearly, and which require as much deliberation, as any that can arise. Now where no special provision is made by the charter, the whole are bound by the decision of a majority of the corporators present.

The power of assenting to amendments must rest somewhere ; and it can, no where, be so conveniently or safely deposited as with the trustees, under the controlling influence of the congregation, exercised through the medium of an election. There is one case, I admit, where the abuse of the right of representation, may be so gross as to induce this Court to reject the act of the trustees ; and that is, where the elective principle would either be entirely abolished, or so vitally impaired as not to leave in the power of the congregation the means of redress by a change of trustees, in case the measure were contrary to the will of a majority of the electors : as if the amendments should declare the offices of the existing trustees permanent. In the case before us, however, the character of the amendments is directly the reverse ; for the appointment of all the trustees is to be submitted to the electors. This point, however, I consider as having been put at rest by the decision of this Court on the application of a majority of the congregation in *July* last ; with respect to which it is not a little remarkable that the party which now demand the assent of the body of the congregation is precisely that which then required the act of the trustees, as the only corporate organ of the will of the congregation.

The second question is, whether there has been a fair expression of the will of the corporation ? and that will depend on whether the meeting at which the amendments were adopted, was in all respects legal.

I do not view the clerical trustees as integral parts of the

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government of the corporation; and consequently I am of opinion their absence would not, of itself, render the proceedings void. The pastors of the congregation to the number of three are *virtute officii* to be trustees; but they are to have no distinct existence as a body. They are not a separate part or organ performing a peculiar office in the government; but their functions are in all respects the same as, and to be exercised in common with, those of the other trustees, all having equal rights and powers. This distinguishes the case from that of an ecclesiastical corporation of brothers and sisters, which is to be held to be incomplete, wherever all the brothers or the sisters happen to be dead. In a corporation of this mixed nature there is the same genuine difference between the functions of the males and of the females, which is found in the economy of every well regulated private family. Such a corporation is in fact nothing more than a family artificially constituted for purposes of devotion. In the corporation before us there is no distinction of classes; except that the eldest pastor present at any meeting shall preside. But this was never intended to distinguish the capacity or privileges of the person entitled to it, any more than if it had been declared to belong to the eldest or tallest member present. It was a precautionary measure to prevent collision, and as a mark of courtesy, to give the clergy precedence over the laity; but it was, by no means, intended to render their presence indispensable; such an intention would have been expressed in direct terms.

But what says the charter? "The eldest pastor present shall preside, and if seven of the said trustees shall attend, they shall form a quorum or board." Now here is no distinction as to *branches;* but *any* seven "of the said trustees" are to be a quorum. If the clerical trustees are a separate branch, they ought necessarily to be present by a majority of their number: not a word, about which, is said in the charter. The direction that the eldest pastor present shall preside, is evidently applicable only to meetings where the pastors or some of them shall, in fact, attend; and it would have exhibited an unnecessary, and even an absurd, attention to precision, to have expressed this specially; for nothing is more evident than that if none of them attended, none could preside.

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Besides, it never could have been intended to put it in the power of the clerical trustees to suspend the operations of the corporation, by withdrawing themselves, perhaps at a season when the temporalities of the church most required attention; or in case of vacancy of the congregation, to jeopardise its interests by reason of the corporation being incomplete as to parts which a foreign jurisdiction only, and not the congregation, could supply. The construction which declares the pastors to be an essential part of the corporation, at the same time, puts the congregation at their mercy: the majority of laymen in the board is rendered unavailing the moment the clerical members choose to retire: the corporation can do no act even in the most pressing emergency: the church may fall into dilapidation, and the interests of the congregation go to ruin; and this state of things would continue, without a possibility of amendment, as long as the clerical members should hold out.

If therefore the clerical members absented themselves without a direct inhibition of their presence, the meeting at which the amendments were adopted was legal; but if the members who met and acted had precluded them, or any of them, from attending, their proceedings were void. I have found no case direct to the point; but independent of those where meetings have been declared illegal for want of notice to corporators who were entitled to have it, reason alone is sufficient to shew that members who have been forcibly excluded, are not to be bound by acts to which they were not parties. The reason why the act of the majority is considered the act of all who actually were, or had an opportunity to be, present, is that the law presumes the assent of each individual to have been given to every act to which he was a party; the act of the majority being the act of each.

But no such conclusion arises where one or more of those who ought to have been actors, have been forcibly excluded: the legal presumption of assent can never take place where the party had *no opportunity* to assent. The fundamental principle of every association for the purposes of self-government is, that no one shall be bound except with his own consent expressed by himself or his representative; but actual assent is immaterial, the assent of the majority being the assent of all: and this is not only constructively, but ac-

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tually true; for that the will of the majority shall, in all cases, be taken for the will of the whole, is an implied, but essential, stipulation in every compact of the sort: so that the individual who becomes a member assents before hand, to all measures that shall be sanctioned by a majority of voices. Thus we say we pay taxes, we render militia services, or we perform any of the onerous duties of a citizen, only with our own consent; and this is not the less true, though we perform them with a bad grace. I admit that where actual participation in the government of the country is wrongfully withheld from an individual, by refusing his vote at an election, he is nevertheless bound by the official acts of those who are elected; but that is because there is no superior superintending power to correct abuses from the very root; nor could there be, for the exigencies of society require that the business of government should not in the meantime stand still: the right of the citizen, must, therefore, yield to considerations of necessity. But as to inferior associations where there is a superintending power, it will inquire, where the question is between the corporation and the individual wronged, and not a third person, whether the conditions on which alone each pledged his assent to the acts of a majority, have been performed by those who require the redemption of the pledge; for if they have not, the others, who gave their assent only on those conditions, are not bound.

One of these conditions is, that each shall have an equal right with all the rest to vote, to counsel, and to advise. Whenever, therefore, a member is deprived of any of these, the act of the majority is not his act, and consequently not the act of the corporation, which consists of all its members. Now the clerical trustees were Bishop *Conwell*, the Rev. Mr. *Hayden*, and the Rev. Mr. *Cummiskey*. It is altogether immaterial, therefore, whether the suspension of the Rev. Mr. *Hogan*, (who was present at the meeting at which the amendments were adopted,) were valid or not. As to clerical members, the board was full without him; but I would not consider his being at the meeting and acting as a trustee, as alone sufficient to vitiate the proceedings, as there was a majority without his vote. The question is, were the clerical trustees debarred from the exercise of their corporate rights? I cannot view the protest against the right of the

bishop or Mr. *Hayden* as an exclusion. It contained no direct inhibition; but, on the contrary, an express declaration that their continuance at the meeting, and participation in its business, would not be opposed. The protest then was an *assent* to their continuing to exercise the functions of trustees subject to all legal exceptions: it was a saving of all objections to their right in case the lay corporators should afterwards think proper to contest it: it was to avoid an inference of acquiescence, which might otherwise possibly have been drawn from silence. The proceeding may have been indelicate, and sufficient to induce a gentleman of nice feelings to withdraw; but we are not to decide the cause on the rules of good breeding. I am of opinion, it is necessary that there should have been a direct ouster.

Neither do I view the restoration of the Rev. Mr. *Hogan* to the active duties of a pastor, as such an exclusion of the others as can be recognised by this Court. If, in consequence of that act of the corporation, the clerical trustees thought themselves bound, (as they say they did,) by the discipline of the *Catholic Church*, to abstain from all interference in the concerns of the congregation, whether temporal or spiritual, it was a matter that rested with their own consciences. We are not here on points of faith or the dogmas of any particular sect. This corporation is essentially and exclusively *lay* in its constitution; and although a portion of its trustees are clergymen, it has no jurisdiction of spiritual things, being incorporated exclusively for purposes of civil administration. It is not even mixed; for although three of the trustees are clerks, it is not so much the character of the *corporators*, as the nature of the *objects* to be accomplished, which determines the character of the corporation. What this corporation, then, has to do with, is the temporal business of the congregation: its spiritual concerns belong to the dignitaries of the church, another, and a distinct branch of its government; and to that, all questions of disabilities for conscience sake, must be referred. It is sufficient therefore that the restoration of Mr. *Hogan* presented no actual obstruction; and if the pastors withdrew in consequence of it, their absence is to be considered as having been voluntary.

But as regards Mr. *Cummiskey*, there was a direct exclu-

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sion. If the lay members had the right to expel, the reason they assign for his amotion, is bad. An expression of dissatisfaction at a particular measure of the corporation and a supposed confirmation of such expression, by withdrawing for several meetings, are no ground for expulsion under the charter, or any bye-law which has been shewn. As therefore the amendments were adopted at one of these, I am of opinion, that the application should be denied on *that* ground.

The illegal amotion of this trustee was a violation not merely of his own rights as a corporator, but also of those of every corporator whom he represented; and as each trustee, whether constituted by the clergy or laity, is the representative of every member of the corporation, it cannot be said that the corporators were fully or fairly represented at any of the meetings subsequent to Mr. *Cummiskey's* expulsion: consequently these meetings were illegal.

There is, however, another question on which it is proper to express an opinion, and with respect to which, I regret the sentiments of my brethren, and those I entertain, do not coincide: Are the proposed amendments lawful?

Here it is proper to premise that it is evidently unfair to treat this question as if *we* had succeeded to the power of the Legislature over the subject. We have no power to incorporate or grant amendments. By the Act of 1791, that is vested in the association or corporation itself. All that is referred to us, is to say whether the objects, articles and conditions of the instrument submitted to us, are lawful and in this we exercise no other or greater power than what must have been previously exercised by the Attorney General. All considerations of a mere discretionary nature, as to the policy or the propriety of the amendments must therefore be discarded. The mere line of abstract lawfulness, it may be difficult to ascertain; but when once actually ascertained, it must govern.

In judging of the lawfulness of articles or amendments, it was not, I admit, the intention of the Legislature, to confine us to a consideration of what should directly appear on the face of the instrument, without reference to extrinsic circumstances. We have already acted on this principle by refusing to certify in favour of associations of married women, because they might involve their husbands' rights in

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their own corporate responsibilities. In the case before us, the objection to the amendments is urged on the ground of their being supposed to impinge on interests secured by the charter. The inquiry will be, would the Legislature itself, by an express statute *made with assent of the corporation*, have power to alter the charter in the points proposed? For if it would, it is clear, the same power in its full extent, is transferred to associations and corporations subject, as this is, to the Act of 1791. The Legislature, wearied with the frequency of applications for acts of incorporation, pass a general law vesting in all associations for literary, charitable, or religious purposes the power of self-incorporation, and of adopting amendments to the charters thus created, without any restriction, except as to the lawfulness of the objects, articles, and conditions of the charter to be established, or the amendments to be procured. There is, therefore, in all *other* respects, a transfer of the *whole* power of the Legislature over the subject. If there is not, where shall we draw the line of restriction? But I admit that the Act of 1791, which is an *enabling*, not a *disabling*, statute, was never intended to trench on chartered privileges; nor would it here, for we have the *assent of the corporation* to the amendments; and this distinguishes the case from that of *Dartmouth College* v. *Woodward*, 4 *Wheaton*, which I however take to be a strong authority in favour of the doctrine I advocate. All that was decided there was, that the college should not undergo a violent transformation at the mere will of the Legislature; but it was not supposed by any one, that, if the assent of the corporation had been procured, the Act of Assembly would have been unconstitutional. In the case before us, the amendments are proposed by a body uniting in its own person all the power of the Legislature over the subject, and all the rights of the corporation. If therefore there are interests secured by the charter, they must exist in individuals who are third persons; and these are supposed to be:—*First*, The original contributors and donors, or their representatives: *Second*, The clerical trustees. Of these I shall speak in their order.

The congregation has undoubtedly received large donations from individuals; but whether before or since it was incorporated, is by no means material to the argument. If

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received before, the gift was absolute: at least the permanency of corporate provisions could not have been an implied condition, for there were none.

If received since, the gift was either absolute or conditional, and if the former, there is an end of the argument. But if it were conditional, the donor or his representative might resume it, in case the proposed amendments should work a forfeiture, and this would be their only redress; for it can never be endured that a conditional gift of ten dollars shall arrest the progress of improvement in the civil administration of a congregation which has other property involved, perhaps to the value of a thousand times that sum. But if it were given without condition, its future application was confided to the discretion of the donee, who is, to that end, the representative of the donor. In the *Dartmouth College Case* it is supposed by Mr. Justice STORY that there is "an implied contract between the corporation itself, and every benefactor, that it would administer his bounty according to the terms and for the objects stipulated in the charter." 4 *Wheaton*, 689. But it is evident that every donation where there is no condition expressly reserved, is rather on a *trust* or *confidence* that the thing given shall be faithfully applied to the general objects of the institution according to the reasonable discretion of the trustee, who must necessarily judge of the mode. I think this is fully supported by the opinion of Chief Justice MARSHALL in the same case, where, with clearness of perception and strength of expression for which he is conspicuous, he says: "The consideration for which they stipulated is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration; but in this respect *their descendants are not their representatives: they are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty as they would themselves have distributed it, had they been immortal.*" *Ib.* 642. The truth is, there *must* be a discretionary power somewhere, to vary the application of the fund according to the ever varying exigencies of times and circumstances. It is contrary to the spirit of our laws to permit an individual to direct the descent of his property, or to tie up the particular mode of

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its application to specific objects for an indefinite period after his death. There may be cases where it is fair to suppose a founder or large contributor had fundamental objects or leading principles of application in view; and on a question of amendment before the Legislature, which may interfere or not at pleasure, the consistency of such objects or principles, with the amendments sought, should have weight, and in some cases sufficient to turn the scale. But the discretionary power of the Legislature is transmitted along with the power of self-incorporation to every association subject to the provisions of the Act of 1791, which thus becomes the exclusive judge of the propriety of its exercise. The peculiar confidence between the donor and the donee, being of a nature which precludes its being taken cognisance of by a tribunal which disclaims all arbitrary discretion and professes to act according to fixed rules, cannot be enforced here: what we have to do with, is the lawfulness, not the propriety, of the amendments. But whatever may be the designs of the party who propose them, (and we cannot discover them from the amendments themselves, whatever we may have heard out of doors,) these supposed stipulations of the original members, received no sanction from the charter. The congregation was incorporated not in its ecclesiastical, but its lay aspect. That it should continue to hold the tenets, or be subject to the discipline of the church of *Rome*, was no condition of the charter, express or implied. A congregation of any other sect, could have had a charter as readily as this. Stipulations for forms of doctrine or points of faith, were matters to which the Legislature was not a party, and with which it had nothing to do. This congregation was incorporated, like every other, to enable it to manage its temporal concerns to the best advantage. The establishing of a particular set of religious opinions by law, is contrary to the genius, not only of our government, but of the age in which we live.

But if the Legislature were originally a party, it is a party still, and may wave all conditions reserved, as far as they depend on its consent: and it appears to me it has expressly waved them by passing the special Act which subjects this corporation to the provisions of the Act of 1791. The assent of the corporation to the amendmente, is the assent of

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the Legislature, and a waver of all previous conditions. But I cannot discover how the proposed amendments would conflict with those conditions.

I understand that none of the amendments, but that which proposes to abolish the right of the pastors to be trustees *ex officio*, is regarded as a violation of chartered rights. Now take it that the original contributors, or the donors since the charter, were staunch *Catholics*, and that their donations were made under a supposition, and with the intent, that the congregation should continue subject to the discipline of the church of *Rome:* does the management of its temporalities by trustees exclusively lay, and appointed by the congregation, militate against those objects? Their donations were not to the *church*, but to this particular congregation; and it is, therefore, by no means necessary that the church should be represented, by a part of its body, in the management and application of them.

I conclude then, that a regard for any supposed objects of the contributors ought not to defeat the amendments; because we do not know that those objects were conditions of their grants; because if they were, a discretionary power over such conditions must be considered as vested in the corporation; because we do not know that the amendments interfere with those conditions; and because such conditions were never recognised as a consideration for the charter, further than as an obligation resting in the conscience and discretion of the corporation.

I proceed to consider the interest which the clerical trustees are supposed to have in the question. I cannot discover in the Act of Incorporation, any intention to vest an interest in those gentlemen, which should not be subject to future disposition by the Legislature. The pastors of the congregation *duly appointed*, (which I admit means *inducted according to the rules of the Catholic Church*,) are, to the number of three, to be trustees *virtute officii;* and it is said this is a fundamental article of the association: be it so. But is not every article of a charter, (which is the *constitution* of the corporation,) fundamental? Every application to amend, is an application to change a fundamental law. As long as such law is suffered to exist, all the interests secured by it, are to be held sacred: but I know of no implied condition of

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association, by which the creating power is to be restrained from changing the original articles. This corporation by the special Act of 1821, subjecting it to the provisions of the general Act of 1791, has succeeded to all the power of the Legislature over the subject of amendments; and I think I have shewn that all implied stipulations between individuals and the body about to be formed, rest merely in conscience, and cannot be enforced by the civil authority.

But what is the nature of the personal interest which the pastors are supposed to have under the charter? It cannot be an interest in the *property* of the corporation. They are not, as has been argued, joint tenants, or tenants in common, of the legal estate: that does not rest in them as individuals, but in an invisible, intactible, and incorporeal being, *the corporation*. There is no survivorship among them; neither is their interest transmissible to their heirs. They have no personal interest of a *beneficiary* nature under the corporation as a trustee. The corporation is seised in trust for the members of the congregation, but the pastors, as such, are not members of the congregation. They stand in the relation of persons employed and paid by the congregation; and paid out of a fund to which they are not bound to contribute. They are men without families and represent no portion of the laity; whatever is given by them is surely gratuitous. They are members of the congregation only by force of the Act of Incorporation, which invests them with office in its civil government. What interest they have, must therefore be in the *office* of trustee.

This is a trust not coupled with an interest; for, as individuals, they have neither the legal nor the equitable estate. I do not insist on this as a matter of any importance; for I admit that a fiduciary interest is as much under the protection of the law as if it were beneficiary. It is more important to consider the object of the trust. This the Legislature tell us in the preamble of the Act is, to enable the congregation "to manage the temporalities of their church as other religious societies within this State have been enabled to do." Surely an indefeasible right of office in a particular class of the corporators was unnecessary for that purpose. But who are these corporators? The pastors for the time being, duly inducted, and not exceeding the number of three.

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Now as *St. Mary's* is the cathedral church of the diocess, the bishop is necessarily one; and he has beside the nomination of the other two, who hold their offices by no other tenure than his pleasure. They are strictly tenants at sufferance; for the instant their faculties, as pastors, are withdrawn by his *sic volo*, they cease to be trustees. He then has, in effect, three votes out of eleven in the lay government of the congregation. This is no theoretic influence. We are told by a very respectable clergyman who was called by those who oppose the amendments, that "they all are bound to follow him: he is their leader." But the bishop himself holds his office on the same terms of unconditional submission to the papal see. He, at least, derives his authority from that source. Now from this, it is evident the pastors are not the parties in interest at all. It certainly cannot be pretended, in any view, that they have a freehold in the office, or an indefeasible interest of any kind. When more than three have been inducted, they all, (as well those who are trustees for the time being, as those who are not,) select from among themselves the three who are to be trustees for the ensuing year. It is the franchise of the *Catholic Church*, not of the individual; and the head of the church therefore is the real party in interest. Here then is a foreign jurisdiction, in its nature political as well as ecclesiastical, holding and exercising the power of appointing to an office, created by the government of *Pennsylvania*, for purposes entirely civil and domestic. Can it be said that the Legislature has so far divested itself of power over the subject, as to be unable to resume the right of the appointment, and to place it elsewhere? Far be it from me to counsel the *Catholics* of this country to shake off their spiritual allegiance to the pope: that is their concern, not mine; but I do protest against a right of appointment to a civil office, incautiously granted to a foreign potentate, being held irrevocable by the laws of our own country. With me it is of no consideration that the *Catholic* bishop is elected by the *Catholic* clergy, here or elsewhere: both he and they acknowledge the see of *Rome*, as the source of all their authority, and the supreme power to which they are responsible. It is enough that our citizens here, whose rights are involved in the government of the corporation, have no voice in no-

minating or rejecting the pastors who are to sit over them. Will it be said that the annexing of the office of trustee to the *office* of pastor, as an *incident* or *accessory* of the latter, is a direct and *personal* grant of corporate office, to the clergyman who may be in the actual discharge of the pastoral duties? It was never so intended. This union of office was created for temporary purposes of convenience; not to vest a permanent interest in individuals or any ecclesiastical body; and when purposes of convenience will be promoted by the measure, it may be dissolved by the same power which created it, or by those to whom that power has delegated its authority. In this view, neither the authorities of the church, nor the pastors as individuals, have ground for complaint. By depriving the principal of its accessory, the right of the pope, the bishop, or the individual pastors, which never extended beyond the principal, are left untouched, and precisely as they existed before the union of these two offices. But even should the provisions of the charter amount to a constructive grant of the right of appointment to a foreign potentate, I would hold the grant void on the ground of surprise. It never was the actual intention to pass such a right; but only to point out a mode of selecting a portion of the trustees, which might be changed as circumstances should require.

I am therefore of opinion, that the amendments are lawful: and that if they had been adopted at a meeting at which all the trustees were either present, or had an opportunity to be so, we ought to grant the usual certificate. I have not inquired into the regularity of the meeting in other respects, as no objection has been made on any other ground: my objection rests exclusively on the illegal expulsion of Mr. *Cummiskey*.

Duncan J.—The application for the amendment of the articles of incorporation, of the members of the religious society of *Roman Catholics*, belonging to the congregation of *St. Mary's Church* in the city of *Philadelphia*, is made under the corporate seal, and is supported by a majority of its members.

It is remonstrated against by its pastors, and is opposed by a numerous body of its members, on the grounds—*First*, That it is not made by the members of the church. *Second*,

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That it is not made by the corporation. *Third*, That one of the proposed amendments is unlawful, and disfranchises the pastors of the church, an integral and distinct part of the corporation.

The exercise of the authority of this Court to grant and amend charters, is not the usual exercise of a judicial function:—it is untried ground, and from the discussion of this question, delicate ground. When an application was made for a charter, the Legislature supposed that there would be no diversity of opinion among the associators, and have limited the inquiry of the Court, to the lawfulness of the objects, articles and conditions of the proposed charter, and in like manner to the lawfulness of the improvements, amendments, or articles afterwards desired. The difficulties in the exercise of this special authority are not few. They were not foreseen, and are not provided for. But they are increased in the cases of proposed alterations. Should the application for amendment be by a corporate Act, and every member of the society, but those of the corporation, remonstrate against it, is the Court bound to grant it? Could they exercise a discretion, when a bare majority of the members are in favour of it? Ought they to grant it, when the corporation consists of two integral parts, and one asks to exclude the other, who claims by a vested right—where one is lay, and the other ecclesiastical, holding by different tenures—one depending on annual elections by all the members of the church—the other by a permanent tenure—a permanent body—deriving their right under a different authority, whose superiority all acknowledge—for all here acknowledge the bishop's right to appoint a pastor, and by the Act of incorporation the pastor *virtute officii* is a trustee.

In the opinion delivered by the Chief Justice, on a former occasion, there is a strong intimation, that where the corporation comes before the Court for an alteration, to which the assent of the society has not been obtained, on affidavit of the facts, a remedy might be found, by which the rights of the society might be protected—(minorities likewise have their rights,) and I know not of any other than denying the amendment. It is the province of a Judge to decide, and not to advise; but every virtuous citizen, to whatever religious society he may belong, must desire, anxiously desire

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to see peace restored to this very respectable, but miserably distracted church. It is to be regretted that in these church differences, and I do not confine it to this church, the observation extends to all—we do not always find that meekness, and charity and forgiveness, and humility and forbearance, and bearing with each other's infirmities, required by the Divine Author of our religion—that which begins in conscience and sincerity, as the contest waxes warm, becomes one of spirit, of passion, and of pride.

Pride and passion will always beget error. For my own part, without intending offence, I see in this transaction much of error on both sides: something to undo, steps to be retraced, mutual forgiveness to ask, and to receive. Accusations are made, recriminations follow, until the parties lose sight of the matter in controversy and of each others real character—a little spark which a drop of water would have quenched, one breath of kindness blown out—which had it been let alone, would have gone out itself, has been fanned into a fierce flame by an immediate and vigorous exercise of power, not opportunely, perhaps not very temperately exercised on the one side, and a proud defiance on the other.

It would be well for both parties to pause and weigh the consequences, not only to this particular church, but to the *Roman Catholic Church* in this country generally, to whose doctrines and discipline both profess an adherence—it would be happy indeed for themselves, and all good men would rejoice in it, if by a mutual sacrifice of petty resentments, peace were re-established—for whatever may be the result of this application, there will be little room for triumph. The victors may find it a most disastrous victory, and find in the end, they cannot subsist without the aid of those who, though defeated, are not vanquished, and laid prostrate at their feet, and that the church can never prosper but by a union. A house divided against itself cannot stand. By withdrawing or stinting the stipends, the lay members may starve out the stoutest priest, or most abstemious and mortified prelate, though they have no power to appoint or remove them; for here there are no benefices, no church establishments of the State, no tithes or seigniories, or domains assigned for the support of the clergy—they depend on the voluntary contri-

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butions of the people, and while the people hold the purse, treating the clergy with all liberality, respect and reverence, this will effectually check all oppressive exercise of the legitimate power of the church, and render fruitless every attempt to infringe on their civil rights.

I have conscientiously applied my understanding to the question of the parties' legal temporal rights, divesting my mind of what have been called in the argument protestant prejudices, for nothing of that kind should mingle in deciding questions of mere right. If I had any, I am not indulging, but deciding against them. The constitution of our country has wisely and justly secured to every man the natural and indefeasible right to worship Almighty God, according to the dictates of his own conscience. And this Court disclaims all jurisdiction in questions of dogmatical theology and polemic divinity; for if they did exercise it, they would be at a loss to find legal principles on which to decide. Yet in deciding on the temporal rights of any religious society, it becomes their duty to inquire into the articles of their government and discipline; for no society can exist without some government, give it what name you please, call it ecclesiastical council, convocation, presbytery, synod, general assembly,—some claiming the right to govern the church *jure divino*, or by apostolical institutions, and others with more humble pretensions claiming spiritual authority from things merely human—each has a discipline and church government of *its own*, some platform, but this is confined to spiritual matters and exercised *pro salute animæ*.

This is a principle well settled in this Court. On a writ of error from the Common Pleas of *Huntingdon* county, *Riddle et al.* v. *Stephens*, 2 *Serg. & Rawle*, 542, it is stated with great clearness and strength by the Chief Justice. The demand of the plaintiff below, *Stephens*, was for services rendered the defendants as their pastor. The Chief Justice observed, "the presbytery, according to the rules and discipline of the *Presbyterian Church*, had power to suspend the functions of the plaintiff, or even to remove him from his ministry; so far as respected his suspension or removal, the jury were directed to consider the proceedings as evidence, but no regard was to be paid to the details of evidence be-

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fore the presbytery; the particular facts alleged or proved were to have no effect on the verdict. The decision of the presbytery as to the suspension, or removal of the plaintiff, was the only matter to be regarded.

"Every church has a discipline of its own—it is necessary that it should be so, because without rules and discipline, no body composed of numerous individuals, can be governed. But this discipline is confined to spiritual affairs, it operates on the mind and conscience, without pretending to temporal authority. No member of the church can be fined or imprisoned, but be he lay man or minister, he may be admonished, reproved, and finally ejected from the society. So he may retire from it at his own free will. Under these restrictions, religious discipline may produce much good, without infringing on civil liberty. Both plaintiff and defendants were subject to the laws of the church, both as to the induction and removal of the plaintiff; it was not in the power of the defendants alone to remove the plaintiff—the presbytery alone could do it with a right of appeal to the synod, and in the last place to the general assembly. This being the case, it was to no purpose to enter into the plaintiff's conduct before the jury; the cause had been heard and decided by the presbytery, and so far as regarded the plaintiff's continuance in the ministry, the decision is binding, subject to appeal."

The independent churches of *New England*, fleeing as their founders did from the rod of the hierarchy, and seeking that religious freedom in the wilds of this country, which the mother country denied, yet found it necessary to form some system of church discipline, and as early as 1648, formed one called the *Cambridge Platform*—a council of other churches is made necessary for the removal of a minister. The minister does not hold his office at the will of the people, but in case of any difference between them, a neutral ecclesiastical council may be convoked at the prayer of either party. The decision is called the result, it is given by way of advice, and does not bind the party rejecting it. But still in Courts of law it is considered a justification of the party who should adopt it. *Avery* v. *Inhabitants of Tyringham*, 3 *Mass.* 160, *and Burr.* v. *Inhabitants of Sandwich*, 9 *Mass.* 277. And in *England*, the discipline of religious societies

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dissenting from the established church is recognised; for the entry in the books of the Society of Friends, of the expulsion of a female Friend, being a matter of discipline, was considered by the Court as not libellous. *The King* v. *Hart*, 1 *Black. Rep.* 386.

On the first question the Court gave an opinion on a former occasion to which I adhere, that the application for amendments must come from the corporation—it must be a corporate act. But this does not prove that the Court is precluded from inquiring into the whole matter, or bound to grant a fundamental alteration, either altering the qualifications of the electors, or those that are eligible, against the remonstrance of a majority of the members, or a great body of the members, although in an original charter this might be lawful: for then a corporate body might so modify the charter as to keep themselves in power forever. Besides, there would be no end to these changes, and every year there might be some new bone of contention, and charters, which should be fixed and stable, would vary as caprice or passion would direct, and of these varieties and changes of constitution, as is said of making books, there would be no end. I do not speak of the alteration of mere regulations in the charter, which, experience had proved to be incorrect or impracticable, but a radical change of the body politic. It would be prudent in every charter, to insert a clause providing for amendments, and the manner in which the application is to be made—and by whom, and how the sense of the members, and the approbation of the proposed amendments, are to be signified. Such provision as is contained in the constitution of the *United States*.

There is a wide difference between the grant of an original charter and a radical change. Those provisions in their nature formal, and those altering the general constitution of the trust itself, are quite different things. The members of any religious society, will find no little difficulty in halting between two opinions; it is pretty much the discipline of all churches, to declare that he who is not for them is against them—that a man cannot serve two masters; and pretty much the practice to cut off diseased and condemned members, lest they should corrupt the whole body. I cannot bring myself to the opinion, that there is a power vested in this Court,

on the application of the corporation, under the name of amendments, to change the body corporate, and to transfer the estates of a private association, and the right of managing, regulating and disposing of them, to other classes of men, than the associators and the charter vested in it.

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But is this application made by the corporation? Is it a legal corporate Act? The seal may authenticate the Act, but is no more than *prima facie* evidence of the legality of the meeting. In considering the second and third objections, it is important to give a character to the corporation. That it is a private corporation, an elemosynary private institution, cannot be doubted. It is not a public corporation, for that is only such, where the government has the sole right, as the trustee of the public interest, to regulate, control, and direct the corporation, and its funds and franchises—one created for public purposes. This is a private association and institution—the giving it a charter does not make it a public one; the charter cannot make a charity more or less public, but only more permanent than it would otherwise be; it is the extensiveness which constitutes a public charity. *Attorney General* v. *Pearce*, 2 *Atk.* 85. It continues what it originally was, a private religious charity, founded on private donations, supported by them, and unendowed by the State, and if it were not such an institution, there is an end to the dispute; for this Court have no power to grant, or to amend the charter of a public institution created for public purposes. The jurisdiction vested in them is confined by the Act of 6th *April*, 1791, to private associations for charitable or religious purposes.

The title of the Act, the preamble and enactments, all prove this. It is entitled "An Act to confer on certain associations of citizens of this Commonwealth, the powers and immunities of corporations or bodies politic in law." The preamble recites that a great portion of the time of the legislature had heretofore been employed in enacting laws to incorporate associations, and it would not only be more advantageous to the public, but also convenient to individuals who are desirous of being so incorporated, &c. The Act incorporating this society was a private act, which must have been pleaded, and of which the Courts are not bound to take *judicial notice* without plea; it is rather a private conveyance

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than a solemn act of legislation. 2 *Bl.* 346. In passing a private bill, nothing is done without the consent expressly given, of all parties in being and capable of consent, that have the remotest interest in the matter, unless the consent shall appear to be perversely and without any reason withheld, and in every bill of this kind, the rights of all persons except those whose consent is given or purchased, are saved. These bills have been relieved against when obtained on false or fraudulent suggestions, and they have been held to be void if contrary to law and reason. *Ibid* and 4 *Rep.* 12. It is then a private conveyance by the donors and the state in trust for the members of this society. All the members are incorporated, and the estate of the donors and the management of that estate and the temporalities of the society, by their common consent, testified by the acceptance of the grant ratified by the State, is vested in the first instance in three pastors by name, and in eight lay men by name; and in providing for a succession, of the *same* orders, lay and ecclesiastical; the same numbers, three clerical and eight lay members, are preserved and intended to be preserved for ever. This was a compact; the parties to which were the contributors, the members of the church (all of whom had most probably contributed something) and the State.

The object (to me it is as clear as light can make any thing,) was to give the pastors a participation in the management of the estate and the funds, and to render the clergy and the laity in this particular independent of each other. It is a kind of mixed corporation, partly lay and partly ecclesiastical, each having a voice in all corporate acts. Of corporations some are spiritual, some temporal, some consist wholly of persons spiritual and secular, and some of persons temporal only, and some mixed of persons ecclesiastical and temporal. 6 *Vin.* 256. In 1 *Rolle's Abr.* 515. *Tit.* Corporation, it is said, that if a corporation be constituted of brothers and sisters and all the sisters die, this is no perfect corporation.

Of this last class is the corporation of *St. Mary's Church*, temporal, but of mixed persons, lay and clerical members. The object is clearly expressed: 1. The pastors are permanent trustees, the lay members fluctuating. They derive their rights and their franchises from different sources. The lay members from laymen, the ecclesiastics from a spiritual

head. 2. The ecclesiastics are constituted *ex nomine* by the name of pastors; they hold *virtute officii:* so far is the separation kept up between them and the laity, that it is provided, that if the number of pastors exceed three, they shall choose among themselves three for the ensuing year;—and 3d. The head of the body in all corporate meetings must be a pastor —there is no charter day, but there is no provision for a meeting without this head. When legally assembled, the majority of voices govern; but every integral part must be present at a corporate assembly, by a majority at least of its proper members, though the major part of all present, when assembled, are competent to do a corporate act. A charter required the presence of a mayor at all corporate acts; the corporators were assembled, and a matter being proposed, the mayor dissolved the assembly, but the major part of the corporation continued together, and proceeded; it was objected that such after proceedings were irregular. But the Court said it was very true that no new business can be proposed in the absence of such officer, but the assembly always has a right to proceed in the business which was begun in his presence. *Barnard. K. B.* 386. *The King* v. *Norris.*

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The evidence is very full, that the bishop, *St. Mary's* being his Cathedral, was one of its pastors; the Rev. Messrs. *Cummiskey* and *Hayden* were pastors; and the history of the exclusion of those gentlemen from participating in any corporate transactions, is an account of a most injudicious measure, unwarranted by the charter.

The protest against the bishop and the Rev. Mr. *Hayden* looked so much like exclusion, that I cannot find any other name for it; it is a declaration against their appearance at the board, and participating in its affairs on the ground *that they were intruders* and not trustees. The permission to remain in the room was an exclusion of any other privilege—it had the effect of exclusion; they withdrew. A protest of a minority against an act done by a majority we all understand; but a protest by a majority, that the minority have no right to seats, and shall not appear in them, is not protestation, but mandate.

But the exclusion of the Rev. Mr. *Cummiskey* was a violation of all justice and of all right. The causes most fri-

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volous, and the expulsion most unjust. Removed without a summons, condemned without a hearing. It is under these auspices, and after the exclusion of all the clerical trustees, that this application is made. It is no justification of this improper measure, that it was only following the precedent set them by the bishop in his deprivation and excommunication of the Rev. Mr. *Hogan;* of this they bitterly complain, and not without the appearance of reason complain as an act of oppression and tyranny, and as being against the canons of the church. We cannot but notice that this is the fountain from which all those bitter waters have flowed—without giving any opinion as to the power of the bishop to suspend or deprive him, and the legality of its exercise, reserving that question for our consideration on the motion for a rule to shew cause why an information in the nature of *quo warranto* should not issue against that gentleman, strict justice and impartiality compel me to say, that from what has appeared in evidence, there was some degree of harshness in the manner in which it was exercised, and something of precipitancy in the excommunication, which may have driven the friends of this gentleman to these acts of extremity. But the *lex talionis* was not to be resorted to. It furnishes strong evidence of the value put on Mr. *Hogan's* ministry by so large and respectable a body of his flock, in following his fortune, and their dissatisfaction at the removal of a beloved pastor, as they say, *ad nutum episcopi.*

Whether this suspension, deprivation and excommunication were according to the rules of the *Roman Catholic Church* will be considered and decided on the *quo warranto* motion. On it I express no opinion at present. I am of opinion, that these acts of irregular exclusion of the whole integral part of this corporate body from the meetings in which this subject was considered, and this application adopted by those who now ask not only that they shall be excluded, but their successors forever, is not a legal corporate act, which this Court ought to act upon, and that for this reason, the certificate of the amendments being lawful, ought not to be given by this Court. But I do not stop here, for stopping here might lead the applicants into error. My opinion is, that the proposed amendment, striking out an integral part of the corporation, and substituting another class of men in their

stead, is not a lawful amendment—is not an amendment at all, but the grant of a new corporation and a new charter. Much that is properly referrible to this head I have anticipated in my observations on the first and second objections.

What by the terms of the charter, are the temporal rights of these pastors? They are joint tenants with the eight lay trustees of the whole legal estate of the society—they are the assignees, and representatives of the founders, and each individual of them holds an individual vested right in the franchise, the right to which, by an action in his own name, he might assert, and maintain in a Court of Law. The act of the founders, and the Legislature will have vested this right in them, and these pastors have some real interest in the management of the estate, and funds of this institution. Here the lay members have attempted to deprive them of their stipends; but those members are not permanent; at some future day, the present majority might find themselves in the minority. Men's opinions are not unchangeable, and who knows but at some future day, their presence, their representations and their votes might restore, and even add to them. On the former application, the corporation protested against these amendments, and who will undertake to say, what may be the event of some future election. The very measure that put them out at the last election, may again restore them. Such changes are not without example in elections, on a larger scale, and will continue to be the case, so long as elections continue free, and the minds of men mutable. They have a power coupled with an interest.

But it is said, the clergy ought to have no concern with the temporalities of the church. In my private judgment I might agree to this. The answer is an easy and satisfactory one. It has pleased the donors, and the donors always are considered as the founders of the charity, to think and to act otherwise, and it has pleased the Legislature to confirm it. *Cujus est dare, ejus est disponere,* is a maxim of the law as well applicable to private individuals, as to associations. I do not know what will become of *St. Mary's Church;* what of the corporation. Deprived of the church, they could not be worshippers there. Who would have the right to the church? Those claiming under the new or under the old

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charter?—or neither of them, but the founders and their heirs? These matters ought to be considered by both parties. For it never can be—where the founders of a church have conveyed it—as the act of incorporation here has done, to the *Roman Catholics* worshipping in it—that even a majority of the worshippers can say, all this is wrong—the clergy shall have nothing to do with this estate, or concern in its management—we will manage it ourselves. Those who adhere to the old grant and charter of the founders, and of the State, might justly say, if you do not like the terms on which the grant was made, you may quit; but as for our house we will not desert it. He that gives the first possession is the founder of the charity. *Jenk.* 270. *Pl.* 28. *Fitzh. Grant. Pl.* 5.

This church cannot long remain in its present state. The right cannot be decided by the arm of flesh, or any spiritual arm, but by the invincible arm of the laws of the land. So much for the estate itself. But the franchise is regarded in the law as a valuable thing independent of pecuniary benefit. The charter is a contract between the State, the founder, and the objects of the charity, all of whom are bound by its terms. The contract on the part of the government is, that the property, with which the charity is endowed, shall be vested in a certain number of persons, and their successors designated by the founder, to subserve the purposes of the founder, and to be managed in a particular way. But if the alteration changes the character of the trustees, then they are not the same persons the grantors intended should be the managers. The same identical franchise that has been before granted to *one*, cannot be bestowed on *another*, for this would prejudice the former grant. 2 *Blacks.* 37. All immunities, offices, franchises, or other incorporeal rights, though they are not tangible property, yet are valuable in law. The owner has a legal estate in them and legal remedies to recover his rights. Mr. *Cummiskey* being unjustly removed, could obtain a writ of *mandamus*, which is a civil action, to compel the trustees to restore him to his office.

All this doctrine of corporations and the rights of trustees is fully considered and established as I have stated it in the Supreme Court of the *United States*, *Dartmouth College* v. *Woodward*, 4 *Wheaton*. I cannot distinguish this from a case where all the trustees are removed and others substitut-

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ed, or where they are in by their own names or by their names of office. Should the clergy in *St. Mary's Church* get the upperhand and propose, as an amendment of the charter, an exclusion of all laymen—all would exclaim, this a most horrible usurpation. Every man would cry out, this is unlawful; not an amendment of the charter, but an infraction. Others may see a difference; to me the principle is the same, though the proposition is wilder. But we need not go from home for information on the subject of charters. Our Legislature gives an example of this kind of altering charters, and a result. In the Act of 6th *March*, 1789, 2 *Dall. State Laws*, 660, repealing that which divested the trustees of the *College and Academy of Philadelphia* of their franchise, and vested it in others, the trustees of the *University of Pennsylvania*, and deprived the faculty and teachers of their offices, and restored them to the former occupants, there is this strong Legislative declaration, that they had been deprived of them *without trial by jury, legal process, misuser, or forfeiture*, and the estate and rights of the corporation vested in a new corporation; and it concludes with a protestation, *that all this is repugnant to justice, a violation of the constitution, and dangerous in its precedent to the rights of all incorporated bodies and to their rights and franchises.*

I can consider this charter in no other light than a contract which cannot be impaired—a settlement of estates by an assurance that cannot be broken; a grant of a franchise, of which the tenants cannot be deprived, but by a forfeiture of their rights by misuser or nonuser, and that forfeiture to arise on a conviction in some cause, on a hearing by some tribunal, a body whose jurisdiction the law acknowledges—a judicial judgment of forfeiture.

What the Legislature might do by law is not the question before us, nor do I give any opinion on it. All that is the present duty of the Court, is to certify whether the proposed amendments are lawful, in the way in which they come before us. My opinion is that they are not; that there is no power delegated to this Court to alter the conditions of a trust, or private charity, or change the persons appointed to manage it by the joint voice of the grantors and the State. I have only to observe that the collision between the trustees of the *College* and the *University* terminated in a junction,

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redounding to the honour of both, and to the prosperity of the institution, and to conclude with an exhortation to the members of this church to follow their laudable example and go and do likewise. For the affairs of this society cannot long remain in this state of unprofitable conflict, and it requires no spirit of prophecy to foretell, that if it is not terminated by an union, it must end in a separation.

Amendments rejected.

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If an administrator purchased the land of his intestate at Sheriff's sale, on a judgment recovered for an alleged debt of the intestate, in an ejectment afterwards brought by the heirs of the intestate, who allege the judgment to be fraudulent, if it do not appear that the debt was *bona fide*, and if the administrator had assets to pay it, they may recover the land against the administrator on the ground of fraud, without previously tendering the money paid by him or the value of his improvements. *Riddle* v. *Murphy.* 230

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3. In such suit, the plaintiff may give evidence to prove the health, general conduct, and means of living of the wife, during the separation, and prior to the time when the plaintiff furnished her with necessaries. *ib.*
4. The husband is not exempted from liability for necessaries furnished to his wife, pending a libel by her against him for a divorce. *ib.*
5. The husband is liable for necessaries furnished his wife during her separation from him, though it was by her agreement, if she offer to return, and he refuses to receive her, and has furnished no means for her subsistence. *ib.*
6. Such necessaries must, in such case, be agreeable to the rank and condition of the husband; and the husband is liable not merely for the difference between the sum earned by her labour, and the amount of her necessary expenses; he must support her himself, or pay those who do support her, in a reasonable manner. *ib.*
7. If a husband, on separation, agree to pay a trustee for his wife, an annuity during her life, and execute a bond at the same time for paying the annuity as alimony, for and during the term of her natural life, a divorce *a vinculo*, and subsequent marriage of the wife, do not exempt the husband from a suit on the bond for the annuity. *Blaker* v. *Cooper.* 500

HOMINE REPLEGIANDO.

See EVIDENCE, 24.

IMPROVEMENTS.

See FRAUD, 1. LIMITATIONS, 3, 4. EVIDENCE, 19.

1. After an award in favour of the defendant in a former ejectment, any delay in bringing a new ejectment short of the period allowed by the Statute of Limitations, will not of itself authorise the jury in such second ejectment to annex a condition to their verdict for the plaintiff, that he shall pay the defendant a certain sum for his improvement made since the award. *Collins* v. *Rush.* 147
2. If such verdict be given, the Court, on error brought by the defendant below, will reverse the judgment entered upon it. *ib.*
3. One who enters on land as a trespasser, clears it, builds a house, and lives on it, acquires something which he may transfer by deed or descent. *Overfield* v. *Christie.* 178

INCUMBRANCES.

See LIEN, 1, 2. WARRANTY, 2,

1. It is sufficient in Pennsylvania, to entitle a vendor to relief against the payment of purchase money, on the ground of existing incumbrances, that eviction may take place; it is not necessary that an eviction at law should actually have taken place. *Share* v. *Anderson.* 43
2. It seems that if the most part of such incumbrances are discharged, the jury may allow for the residue in the verdict. *ib.*

INDEBITATUS ASSUMPSIT.

See SURETY, 1.

INDICTMENT.

1. A count in an indictment charging that the defendant sold a lottery ticket and tickets, in a lottery not authorised by the laws of this Commonwealth, is bad for its generality. It should specify the name of the lottery, and the number of tickets sold. *Commonwealth* v. *Gillespie.* 469

INSOLVENT.

See Escape, 1.

INSTRUMENTS.

INTEREST.

INTERROGATORY.

See Deposition, 1.

INTESTATE.

See Orphans' Court, 2.

WARRANTY.

WILL.

WITNESS.

END OF THE SEVENTH VOLUME.

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